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No. 1299

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In the Supreme Court
of the United States

OCTOBER TERM, 1969

In re Complaint as to the Conduct

of

PHILIP WEINSTEIN, Accused,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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In re Complaint as to the Conduct

of

PHILIP WEINSTEIN, Accused,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on October 15, 1969, with a denial of petition for rehearing on November 12, 1969. Petitioner was given until March 12, 1970 to file this petition by letter of January 30, 1970.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is printed in Appendix B hereto, infra, 16, and is reported in 89 Adv. Sh. 409, — Or. —, 459 P.2d 548.

JURIDSICTION

The judgment of the Supreme Court of the State of Oregon was dated and filed October 15, 1969. Rehearing was denied on November 12, 1969 (89 Or. Adv. Sh. No. 8, dated November 26, 1969; R. 693). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

May lawyers in disbarment trials be denied the protection of the Fourteenth Amendment to the Constitution of the United States?

The Oregon Supreme Court says Yes—Lawyers may be denied a speedy trial because "bar disciplinary proceedings are not criminal prosecutions" (App. B, 17).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the Constitution of the United States (App. A, 15).

STATEMENT OF THE CASE

1. Procedural History and Federal Question Presented.

This was an original proceeding before the Supreme Court of Oregon for disbarment of petitioner. It was tried to a Bar trial committee.

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The charges which are the subject of this disciplinary proceeding were docketed with the Oregon State Bar in December, 1958 (R. 227); petitioner was first served with a complaint in November, 1960 (R. 1). The trial on the charges was not commenced until seven years later in October, 1967 before a trial committee of the Oregon State Bar (Tr. 1).

Petitioner filed with the Bar a timely Demand for Dismissal before trial based upon the denial of his right to a speedy trial on the charges against him under the Sixth and Fourteenth Amendments to the United States Constitution. In this demand he fully and carefully set out how he had been severely prejudiced by the delay (App. E, 30). The Demand for Dismissal was denied by the trial committee (Tr. 52, 53). It thereafter proceeded with the trial. Petitioner was found guilty by the trial committee of certain charges and permanent disbarment was recommended by the Board of Governors (App. B, 16).

The Demand for Dismissal was renewed in the Supreme Court of Oregon, App. F, 38) but was denied in the opinion of the court filed October 15, 1969 (App. B, 16). Petitioner was disbarred permanently (App. B, 18).

A Petition for Rehearing was filed by petitioner on November 3, 1969, reasserting his demand that the proceedings be dismissed on the ground that he had been denied his constitutional rights to a speedy trial. On November 12, 1969, the Oregon Supreme Court denied petitioner's petition for rehearing without

opinion (89 Or. Adv. Sh. No. 8, dated November 26, 1969; R 693).

2. Facts Material to the Question Presented.

Disbarment charges were docketed with the Oregon State Bar December, 1958 (R. 227). In November, 1960 a disbarment complaint was filed and served on Weinstein (R. 1).

The disbarment case was not tried until October, 1967—seven years later (Tr. 1). This unseemly delay is the basis of this petition. The seven years can be divided into three periods.

FIRST PERIOD—(November, 1960-April, 1962).

January, 1961, two months after disbarment charges were filed, Weinstein was indicted in the United States District Court for mail fraud, unlawful use of police radio and conspiracy (R. 102, 111).

Shortly thereafter, the Bar filed a second amended complaint charging Weinstein additionally with much of the same conduct as set out in the indictment (R. 65).

The Bar then tried to coerce Weinstein's deposition (R. 36-48). It subpoenaed him for deposition, requiring, among many other things, that he "testify under oath concerning the knowledge and information you possess concerning * * * each of the indictments pending against you in the District Court of the United States for the District of Oregon * * *." (R. 84, 85.)

Weinstein refused to give his deposition; whereupon the Bar petitioned to disbar him on that ground alone (R. 151, 159). This maneuver failed to coerce his deposition. Whereupon, the Bar set the disbarment trial for July, 1961 (R. 182, 189).

Weinstein vainly implored the Bar to delay the disbarment trial until after the criminal trials (R. 86, 95, 176, 177, 183, 190). The Bar flatly refused any delay (R. 188; Ex. 3, letter dated July 3, 1961).

Weinstein had no alternative. He brought a proceeding in United States District Court to enjoin the Bar. Just one week before the disbarment trial was to commence, the Bar was temporarily enjoined from proceeding with the trial (App. B, 20). Later a three-judge federal district court enjoined the Bar from trying disbarment proceedings until both of the federal court cases were tried. (The opinion of the court printed in App. D, 22).

The Bar was baying at Weinstein's heels, closing in for the kill. It was so intent upon forcing Weinstein to trial in July, 1961 that it could only be deterred by injunction.

Petitioner was tried and convicted in federal court on three counts of mail fraud and one count of conspiracy (R. 249). Upon sentencing February 7, 1962, he was suspended from law practice by the Oregon Supreme Court pending his appeal (Letter of February 9, 1962, Oregon State Bar to Oregon Supreme Court, Ex. 3).

The federal injunction against the Bar was lifted April, 1962 upon dismissal of the remaining indictment (Ex. 3). Thereafter, the Bar was free to try the case anytime at will.

SECOND PERIOD—(April, 1962-October, 1964). Weinstein requested that the disbarment trial be held in abeyance until the criminal appeal was decided by the Ninth Circuit Court of Appeals (R. 221, denied R. 227; R. 265, R. 269). From May, 1962 until October, 1964 the Bar kept talking and maneuvering to try the case, but never did get around to it (Ex. 3). During this period the Bar filed a third and a fourth amended complaint (R. 195, 228).

October, 1964 the Ninth Circuit Court of Appeals reversed the entire criminal conviction (Opinion Ex. 147, Tr. 2622). This was now approximately six years since the disbarment matter had been docketed by the Bar in 1958, and nearly four years since charges had been served.

THIRD PERIOD—(October, 1964-October, 1967).

The Ninth Circuit Court of Appeals later withdrew its October, 1964 opinion. In February, 1965 it again reversed all the charges on Weinstein's criminal conviction [*Barnard* v. *United States*, (C.A. 9) 342 F.2d 309].

Not until three years after the Ninth Circuit Court of Appeals opinion of October, 1964 was the disbarment tried: October, 1967. This was not a 27-month hiatus as per the Oregon Supreme Court, or

as the Bar concedes (App. B, 17). It was 36 months —plus the four years from 1960 to 1964.

December, 1964 the Bar stated it was going to file a fifth amended complaint (Ex. 3). In September, 1966, 21 months later, the Bar filed the fifth amended complaint (R. 355).

Nine months later, May, 1967, the Bar filed a sixth amended complaint (R. 380). The case was brought to trial October, 1967 on this complaint (Tr. 1).

The sixth amended complaint charges Weinstein with 25 counts. The 25th count recapitulates the first 24. In the first 24 counts, the years involved are as follows:

1956—Three Counts
1957—One Count
1958—Nine Counts
1959—Four Counts
1960—Five Counts
1961—One Count
1962—One Count (R. 380)

The 1962 count, the most recent, was dismissed by the Bar because of the unavailability of witnesses (Tr. dated 10-13-67, pp. 32, 33). Consequently, there was not one count less than six years in age: 17 counts out of 23 were from the 1950 decade.

REASONS FOR GRANTING THE WRIT

Weinstein was denied his constitutional right to a speedy trial. From docketing to disbarment trial was nearly nine years (1958-1967). From complaint to trial was seven years (1960-1967). It was five and a half years from the time the injunction was lifted until he was tried (1962-1967). It was three years from the time the Ninth Circuit Court of Appeals published its first opinion until the matter was tried (1964-1967).

Obviously, it is important to petitioner that his right to practice law be protected by the Fourteenth Amendment. But this importance is not confined to petitioner. The decision of the Oregon Supreme Court threatens the independence of *every lawyer in the United States.* The decision plainly says that lawyers have fewer constitutional rights than other people and professions. If allowed to stand, this decision will render the legal "profession largely incapable of performing the very kinds of services for the public that most justify its existence." (Justice Black's dissent, *Cohen* v. *Hurley,* 366 U.S. 117, 135). It serves fair notice to all lawyers that if they get into trouble of any kind, that Bar discipline will be rendered on a basis where little or no protection can be expected from the Fourteenth Amendment.

The Oregon Supreme Court justifies this by simply saying that "bar disciplinary proceedings are not criminal prosecutions," and therefore a lawyer has no

protection from the Fourteenth Amendment (App. B, 17, 18). By such classification the Oregon Supreme Court enables itself to skirt and ignore decisions such as *Spevack* v. *Klein*, 385 U.S. 511, and *In Re Ruffalo*, 390 U.S. 544.

The Oregon Supreme Court attempts to gloss over the "dilatory" conduct of the Bar by reference to "volunteers functioning in the disciplinary sector" and the necessity for the "protection of the public" against lawyers (App. B, 17).

Yet it was these very same harried volunteers that literally bulldozed this case to the very brink of trial in July, 1961 over all objections of Weinstein. So wrongfully insistent on trial in 1961 were these Bar volunteers that Weinstein had no alternative than to seek and obtain a federal court injunction against the Oregon State Bar, its Board of Governors, its secretary, its trial committee, and its prosecutors (App. C and D, 20, 22). This injunction stopped the disbarment trial only one week before it was scheduled to start.

Whatever may have been the motive of these volunteers in forcing Weinstein to disbarment trial in 1961 prior to the trial of the federal court cases, the Bar is now in no position to plead that it was not dilatory and could not get the matter to trial until late 1967—over six years later. It could have tried the case at any time after the injunction was lifted—April, 1962.

As for these "volunteers," the Oregon State Bar had the active help and cooperation of the United States Attorney, the FBI, the Postal Inspectors, the Multnomah County Sheriff's office, and the Portland Police Department. It had a lieutenant in the sheriff's office and a paid Bar employee working full-time for many months. It hired a professional investigator (Tr. 2695). [See *Barnard* v. *United States*, (C.A. 9) 342 F.2d 309, 315; Tr. 1364, 1876, 1392.] At trial it had five full-time prosecutors (Tr. 54). It ran up a cost bill for Weinstein of $9,706.37 (App. B, 19). Against all this Weinstein had his one attorney who has attempted to defend him for 10 years now since 1960.

The Oregon Supreme Court says there was "a delay of nearly five years which had been requested by [Weinstein] while related litigation was pending in the federal courts." (App. B, 17). —This is not true. Weinstein obtained the injunction July, 1961. It was lifted April, 1962. From April, 1962 until October, 1964 (Ninth Circuit Court of Appeals' first opinion) Weinstein suggested and requested that the disbarment not be tried—a period of about two and a half years. The Bar was content because Weinstein was under suspension (*In Re Weinstein*, 240 Or. 555, 402 P.2d 751). The very strong and critical opinion of the Ninth Circuit Court of Appeals of October, 1964 (Ex. 147) made it clear to everyone that if Weinstein was to be disbarred, it would have to be done by the Bar.

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The next three years of delay (October, 1964-October, 1967) was particularly inexcusable. How can the apologetic Oregon Supreme Court say there was no "vexatious and unreasonable delay on the part of the Bar" (App. B, 1)? The bar tried to force the case to trial in 1961. Since it was prepared to try the case in 1961, why could it not try it in 1964, 1965 or 1966? Why the delay until October, 1967?

Weinstein was entitled to a speedy trial:

Klopfer v. *North Carolina*, 386 U.S. 213 (1967), holds the Sixth Amendment's guarantee of a speedy trial is applicable to the states through the due process clause of the Fourteenth Amendment.

Spevack v. *Klein*, 385 U.S. 511, 516 (1967), extends to lawyers the Fifth Amendment privilege against self-incrimination.

In Re Ruffalo, 390 U.S. 544, 551 (1968), holds that disbarment cases are adversary proceedings of a quasi-criminal nature, and that attorneys are entitled to the safeguards of due process as guaranteed by the Sixth and Fourteenth Amendments.

The foregoing cases were cited to the Oregon Supreme Court by Weinstein. It dismissed them summarily without mentioning them by name as "inapposite in this case"—"bar disciplinary proceedings are not criminal prosecutions" (App. B, 17). The real reason the Oregon Supreme Court did not mention these cases is because it is impossible to distinguish them, so it ignored them. For its only authority it

cited one of its own decisions. Thus, a man faced with permanent loss of his license to practice law has none of the benefits of the Fourteenth Amendment, says the Oregon Supreme Court. Why? Because a disbarment proceeding is not a criminal prosecution.

Weinstein has been sentenced to permanent disbarment—a penalty of terrible consequences. Nevertheless, the Oregon Supreme Court holds he was not entitled to the protection of the Fourteenth Amendment. Weinstein was charged with serious offenses by the Bar; included were: violations of 47 U.S.C. 501 and 605; 18 U.S.C. 1341; and Oregon Revised Statute 9.460(7).

This Court has held that even forfeiture proceedings are criminal in nature for Fourteenth Amendment purposes, as applied to the state courts. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965). The loss of a license to practice one's profession is hardly comparable to the loss of a Plymouth automobile—or some plate glass (see *Boyd* v. *United States*, 116 U.S. 616 (1885).

The Oregon Supreme Court holds that charges can be left dangling over a lawyer indefinitely. That is exactly what this Court condemned in *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). It is the general type of conduct the Ninth Circuit Court of Appeals condemned the government for with a witness when it reversed Weinstein's conviction (342 F.2d at 317); conduct of the government that "shocked" the Circuit Court of Appeals (342 F.2d at 319, 320).

The Oregon Supreme Court would forfeit a lawyer's constitutional rights because of a paramount public interest in disciplining him (App. B, 17, 18). This argument can be made in relation to *any* crime; adherence would soon decimate all constitutional rights to the level of zero. The Oregon Supreme Court says lawyers are fair game with few or no rights—that *Spevack* v. *Klein*, 385 U.S. 511, 516 (1967), is "inapposite"; "lawyers [do not] enjoy first-class citizenship" in Oregon. This is the surest way to kill independent, strong and fearless lawyers. It will eventually lead to a sniveling, groveling, foot-licking bar; lawyers afraid to stand up for their clients or to espouse any unpopular cause. Petitioner was denied his constitutional rights to a speedy trial. If he can be denied his constitutional rights because he is a lawyer, other cases will follow with devastating effects to clients everywhere, and to the general public.

The Oregon Supreme Court shortsightedly denies constitutional protections to lawyers supposedly for the "protection of the public" (App. B, 17, 18). It will be the public that is harmed by this grossly discriminatory decision. Second class citizens cannot function with vigor as first class protectors of the rights and liberties of the public.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U. S. Constitution

AMENDMENT VI

Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. Citizenship; Privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Opinion of Oregon Supreme Court

PER CURIAM.

The Board of Governors of the Oregon State Bar has recommended to this court the permanent disbarment of Philip Weinstein upon findings by a trial committee that he was guilty of unprofessional conduct.

The accused challenges the findings and recommendation on two grounds: insufficient evidence of guilt, and unreasonable delay upon the part of the Bar in proceeding with the prosecution of his case after filing charges against him.

Of the twenty-five specifications of misconduct charged by the Bar, the trial committee found the accused guilty of seventeen, not guilty of seven, and dismissed one. The Board of Governors, in reviewing the trial committee's findings, concurred in the findings of guilt with reference to fifteen specifications of misconduct. The specifications for which guilt was established included the employment of runners to solicit law business and other professional misconduct sufficient to warrant disbarment. Criminal conduct which was also charged was not proved.

We have examined the record, and find that the specifications of misconduct of which the accused was found guilty by the trial committee and which have been concurred in by the Board of Governors were

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amply supported by evidence. No useful purpose would be served by setting forth the details of the various charges and findings in these reports. For a related case involving most of the same witnesses and similar charges of misconduct, see In re Herbert D. Black, 228 Or. 9, 363 P.2d 206 (1961), and — Or. —, 444 P.2d 929 (1968).

With reference to the asserted defense of unreasonable delay, bar disciplinary proceedings are not criminal prosecutions, and analogies drawn from cases in the criminal courts are inapposite in this case. See, e.g., In re Paul F. Gronnert, 242 Or. 233, 391 P.2d 772 (1964). The Bar concedes that its counsel allowed some twenty-seven months to elapse while pressing charges that undoubtedly could have been carried to trial in a shorter time. If this course of action on the part of the various volunteers functioning in the disciplinary sector of the Bar's responsibilities was dilatory, however, it followed a delay of nearly five years which had been requested by the accused while related litigation was pending in the federal courts. See Barnard v. United States, 342 F.2d 309 (9th Cir.), cert. denied, 382 U.S. 948, 86 S. Ct. 403, 15 L. Ed. 2d 356 (1965).

It is unnecessary to define in this case the proper remedy for vexatious and unreasonable delay on the part of the Bar. None has been shown in this case. It ought to be made clear, however, that the primary purpose of professional disciplinary proceedings is to protect the public. The punishment of an offending

member of the profession is indeed a serious matter, but it is incidental to the protection of the public. If the conduct of a member of the Bar disqualifies him from the practice of law, it would not be in the public interest to dismiss the disciplinary proceedings for no reason other than the Bar's failure to prosecute them with the proper dispatch.

The accused is permanently disbarred, and the Bar is awarded judgment for its costs and disbursements.

Judgment of Oregon Supreme Court

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 6th day of OCTOBER 1969, WHEREUPON on this WEDNESDAY, the 15th day of OCTOBER 1969, the same being the 7th judicial day of said term, when the following proceedings were had:

In re: Complaint as to the Conduct of)
) DISCIPLINARY
PHILIP WEINSTEIN,) PROCEEDING
Petitioner)

This proceeding having been duly heard before a trial committee appointed by the Board of Governors of the Oregon State Bar upon complaint as to the professional conduct of Philip Weinstein, a duly licensed attorney of this court, and the trial committee

having made its report and findings to said board, and thereafter said board having filed in this court the record of all proceedings, together with its findings and recommendations,

And on September 8, 1969, this cause having been duly argued and submitted upon and concerning all questions arising upon said record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their arguments and briefs adopts the recommendation of the Board of Governors.

IT THEREFORE IS CONSIDERED, ORDERED and ADJUDGED that PHILIP WEINSTEIN be and he hereby is permanently disbarred from the practice of law in the state of Oregon.

IT FURTHER IS ORDERED that the Oregon State Bar have and recover of and from the accused its costs and disbursements incurred herein and taxed at $9,706.34.

APPENDIX C

Temporary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PHILIP WEINSTEIN, *Plaintiff,*	)	
v.	)	No. C 61-306
DEAN F. BRYSON, et al, *Defendants.*	)	ORDER

On July 24, 1961, there came on regularly for hearing before the undersigned Judge of the above-entitled Court, plaintiff's motion for an order to show cause why his complaint for injunctive relief heretofore filed should not be granted; plaintiff appeared in person and by his attorney, Dwight L. Schwab, the defendant Oregon State Bar appeared by its attorneys George W. Mead and Carrell F. Bradley, and all of the individually named defendants appeared through their attorney, Roy F. Shields.

The defendants having filed a motion to dismiss and also a request for a three-Judge court to hear and determine such motion and plaintiff's application for injunction, and it appearing to the court that such request for a three-Judge court should be granted;

IT IS THEREFORE ORDERED that a three-Judge court be constituted as provided in Title 28,

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Sections 2281 and 2284 of the U. S. Code to hear and determine such matters; and

It is further ORDERED that the defendants, and each of them, pending the hearing and determination of said matters by such three-Judge court are restrained and enjoined from any further proceeding in connection with the disciplinary proceedings against plaintiff by the Oregon State Bar.

DATED at Portland, Oregon, this 24th day of July, 1961.

CHARLES L. POWELL
District Judge

APPENDIX D

Opinion Granting Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 61-306

PHILIP WEINSTEIN,

Plaintiff,

vs.

DEAN F. BRYSON, RAY H. LAFKY, HAROLD BANTA, CHARLES G. HOWARD, ROBERT C. ANDERSON, J. T. MONAHAN, WILLIAM M. DALE, JR., G. W. KELLINGTON, EUGENE E. MARSH, OWEN M. PANNER, ROBERT T. MAUTZ, HARRY A. SLACK, ROBERT A. LEEDY, ORVAL D. YOKUM, HARVEY S. BENSON, GEORGE W. MEAD, CARRELL F. BRADLEY, JOHN H. HOLLOWAY and OREGON STATE BAR,

Defendants.

Before POPE, Circuit Judge, MURRAY and POWELL, District Judges.

PER CURIAM.

Plaintiff, an attorney at law, and an active member of the defendant Oregon State Bar, brought this action against the Bar and the other named defendants who are members of the Board of Governors, and the Secretary of the Oregon State Bar. He seeks a decree enjoining and restraining the defendants from prosecuting certain disbarment proceedings

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against him until after trial of two criminal cases pending in the District Court of the United States for the District of Oregon wherein he and others have been indicted for certain alleged acts. These acts are identical with some of the acts charged against plaintiff in the disbarment proceedings and for the commission of which his disbarment is sought. Since the action sought injunction restraining the enforcement of state statutes by restraining the action of state officers in the enforcement and execution thereof, defendants requested hearing by a district court of three judges and such court was accordingly constituted.

Upon the institution of the action a temporary restraining order was issued pending the time when the members of the three-judge court could assemble and hear the cause further. Since that time one of the two indictments mentioned has been tried and a verdict of guilty has been returned therein against the plaintiff in this action. The criminal case in which such verdict has been returned awaits judgment pending the hearing of post-conviction motions including a motion for a new trial.

This court takes judicial notice of all that has transpired in said criminal case since the institution of this action. Because of our knowledge of those proceedings and because all of the facts herein have been admitted either by admission of certain allegations of the complaint or by stipulation in open court at the time this cause was called for final hearing upon the

merits, the case presents no question of fact for our determination; and we are called upon merely to arrive at an appropriate conclusion in the light of the admitted facts.

On November 2, 1960, the Oregon State Bar, herein called The Bar, filed a complaint against the plaintiff before the Board of Governors, seeking plaintiff's disbarment. Service of the complaint and notice to answer was made on plaintiff on November 14, 1960. The grounds for such original complaint are not disclosed in this action and they are not material here except that it is admitted that they are grounds other than those brought forward and included in a second amended complaint based upon the allegations in said indictments. Subsequently on motion of the plaintiff he was allowed a bill of particulars of the charges in said original complaint.

On January 23, 1961, plaintiff was arrested on the indictments in two cases in the said district court, said two cases being No. C-19098 and C-19100. The first of said indictments charged the plaintiff and others in several counts with devising and intending to devise schemes and artifices to defraud and to obtain money and property by false and fraudulent representations and executing the same through the use of the Post Office establishment of the United States in violation of § 1341 of Title 18 U.S.C. Also included in the indictment was a count charging plaintiff and others with conspiracy to commit violations of said § 1341. The second of said indictments

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charged the plaintiff and others in several counts with interception of radio communications made and transmitted by the Portland police, in violation of § 501 and § 605 of Title 47 of the United States Code, and with conspiracy to commit such offenses.

The Bar, on March 17, 1961, served and filed an amended complaint in said disbarment proceedings called "Second Amended Complaint," which embodies all of the elements contained in the federal court indictments above referred to. Following the filing of this amended complaint, plaintiff unsuccessfully sought to obtain a bill of particulars of said amended complaint and a portion of the present complaint is based upon plaintiff's contention that the denial of such bill of particulars to him in the circumstances of this case amounted to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In this connection plaintiff attacks as void and unconstitutional for the same reasons § 24 of the Rules of Procedure relative to disbarment under the Oregon State Bar Act which provides that demurrers and motions shall not be allowed in such proceedings.[1] Upon the trial this court ruled that it would not pass upon those allegations of the complaint which attacked the procedure and rules of pleading upon disbarment

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[1] "§ 24. Pleadings. The pleadings permissible in proceedings before the trial committee are the complaint and amended complaint (if any); the answer or amended answer (if any) to the complaint. Demurrers and motions shall not be allowed."

proceedings of the character of those here involved for the reason and upon the ground that this court as a federal court ought to abstain from an adjudication as to such matters under the rule set forth in Alabama Public Comm'n v. Southern R. Co., 341 U.S. 341, and Harrison v. N.A.A.C.P., 360 U.S. 167. Accordingly the court rejected offers of evidence in support of the plaintiff's claim with respect to denial of his demand of a bill of particulars and with respect to his claim as to the invalidity of said § 24.

At the time this suit was instituted and prior to plaintiff's trial upon the first of said indictments, plaintiff's main complaint was to the effect that to compel his trial in the disbarment proceedings prior to the trial of the indictment, would operate effectively to destroy and nullify plaintiff's constitutional right not to be a witness against himself and his immunity from any requirement to take the stand or to give testimony upon the trial of said indictments. His claim of jurisdiction is based in part upon the provisions of Title 42, § 1983 U.S.C. as follows: "Every person who, under color of any statute, . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Plaintiff also asserts that the trial or the prosecu-

tion of the disbarment proceedings prior to the trial of the indictments, would operate to deny him due process of law in that he would be placed in a situation where he would either have to give testimony which could be used against him in the criminal prosecution as fully as if his deposition had been taken or if he refused to testify he could be disbarred for that reason alone under the rule recognized in Cohen v. Hurley, 366 U.S. 117. These same objections, urged in the proceeding before the Bar, were rejected.

Our jurisdiction would appear to be based upon Title 28, § 1343. See Hague v. C.I.O., 307 U.S. 496.

On behalf of the defendants it is urged that they are judicial officers of the state and hence have the same immunity from actions based upon the civil rights acts as would be accorded a judge of a court citing Peckham v. Scanlon, 7 Cir., 241 F.2d 761. In this connection they refer to § 9.550 of Chap. 9, Title I, Oregon Revised Statutes, a portion of the Oregon State Bar Act, which provides that: "The officers of the state bar, the members of its investigating, grievance and trial committees, and its investigators and attorneys acting as prosecutors or counsel, have the same privileges and immunities from civil and criminal proceedings arising by reason of their acts as such, as prosecuting and judicial officers of this state."

Disciplinary proceedings of the kind here involved are under the provisions of the State Bar Act something less than an adversary proceeding resulting in

a judgment of disbarment. Under § 9.540 of that Act the Board's function is primarily to make a recommendation to the Supreme Court of the State. See In Re Black, (Ore.) 363 P.2d 206. It must be conceded that the point thus made by the defendants raises a substantial question as to the rights of the plaintiff to rely upon § 1983, supra, as against these defendants; but we have determined to resolve that question in favor of the plaintiff.[2]

It is conceded, however, that a substantial portion of this case has become moot. Counsel for plaintiff admitted at the hearing before us that if only the first indictment had been brought against the plaintiff, the present case would now be moot for the reason that the charges upon that indictment have now been tried and upon that trial plaintiff took the stand, testified and submitted himself to cross-examination.[3] Therefore no further reason exists why the defendants should not now be at liberty to prosecute against the plaintiff any disbarment proceeding insofar as the same is based or predicated upon the acts alleged in the indictment which has thus been tried.

With respect to the second indictment, we note that the acts and things there charged against the

---

[2] Thus we have no occasion to inquire whether a state enactment such as § 9.550, supra, can limit the reach of the civil rights acts.

[3] It is to be noted that if judgment be entered upon the verdict of guilty in said cause No. C-19098, then under the provisions of § 9.480 of the State Bar Act, plaintiff could be suspended summarily because of his conviction of a felony involving moral turpitude.

plaintiff are wholly different from and unrelated to the acts and things charged in the first indictment. It is our conclusion and we hold that since plaintiff retains the right not to become a witness at the trial of the case instituted through said second indictment, and since his immunity from any requirement to take the stand in said case might cause him irreparable damage in his defense of that case, the defendants should be enjoined from having any hearing in disbarment proceedings against the plaintiff based upon any matter or circumstance connected with or related to the matters alleged in the indictment in No. C-19100, United States District Court, Oregon, and from so prosecuting any disbarment proceeding in any manner which could or might require plaintiff to testify therein with respect to the matters so alleged in said indictment, until after trial and judgment in said cause No. C-19100.

All other restraints contained in the restraining order of July 24, 1961, are hereby discharged and held no longer effective.

This opinion shall constitute the findings of fact and conclusions of law herein.

Decree will be entered accordingly.

WALTER L. POPE
United States Circuit Judge
W. D. MURRAY
CHARLES L. POWELL
United States District Judges

APPENDIX E

Demand for Dismissal

Comes now PHILIP WEINSTEIN, Accused, and demands that the Board of Governors and Trial Committee dismiss all charges pending against him herein, on the ground and for the reason that the accused has been and will be denied his right to a speedy trial, due process and fundamental fairness as guaranteed by Article I, Sec. 10, of the Constitution of Oregon, the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, and the Civil Rights Act, 42 U.S.C.A., Chapter 21. Attached hereto and made a part of this demand is the affidavit of the accused.

DWIGHT L. SCHWAB
Of Counsel for the Accused
Philip Weinstein

In support of this demand the accused relies upon the attached Memorandum in Support of Demand for Dismissal.

BEFORE THE BOARD OF GOVERNORS
OF THE OREGON STATE BAR

In Re:	)	No. 699
Complaint as to the Conduct of	)	Affidavit of
PHILIP WEINSTEIN, Accused	)	PHILIP WEINSTEIN

STATE OF OREGON)
)ss.
County of Multnomah)

BLEED THROUGH POOR COPY

I, PHILIP WEINSTEIN, being first duly sworn, depose and say:

The above-entitled matter was docketed with the Oregon State Bar in January, 1959, nearly nine years ago. I was originally served with disbarment complaint herein in November, 1960—nearly seven years ago.

In January, 1961, I was indicted in the United States District Court for the District of Oregon for conspiracy, mail fraud, and using information gained from public radio (Cases No. C-19098 and No. C-19100), along with a number of other defendants. The trial for mail fraud and conspiracy (fraudulent collision claims) commenced September 12, 1961, and lasted until November 10, 1961. The trial resulted in my conviction on four counts. I was sentenced in February, 1962, to eight years in the penitentiary, together with a fine.

Shortly after my indictment in federal court as indicated above, the Bar filed an amended complaint in this proceeding which incorporated the charges against me in the indictments. Thereafter, the Bar attempted to force my deposition in this disbarment proceeding, and later attempted to set the disbarment proceeding for trial prior to the trial of the federal criminal cases. This was shortly after the decision of the United States Supreme Court in the case of *Cohen* v. *Hurley*, 366 U.S. 117, which held that a lawyer who refused to testify in a disciplinary proceeding could be disbarred on that ground itself. By reason

of my refusal to give a deposition, the Bar attempted to disbar me for that reason also.

By setting the disbarment proceeding for trial prior to the trial on the federal court indictments, the Bar placed me in an impossible position. It was the usual procedure for counsel for the Bar in disbarment proceedings to call the accused as the first witness. Undoubtedly, this was the tactic to be employed with me. Had I testified, (and in the light of the *Hurley* case, I could not have refused), the testimony would undoubtedly be used by the United States Attorney in the federal court trials. Thus, it would have been the same as if the United States Attorney had the opportunity to take my deposition. The Bar and the United States Attorney have always worked closely together in my case. Investigators for the Bar and government investigators have consistently worked together. Furnishing the Bar information was the same as furnishing it to the United States Attorney.

Consequently, I was forced to petition the District Court of the United States for the District Court of Oregon to enjoin the Oregon State Bar from forcing the disbarment case to trial prior to the trial of the criminal cases (*Weinstein* v. *Oregon State Bar*, Case No. 61-306). The federal court enjoined the Oregon State Bar as per my petition, and to guarantee my rights pursuant to the Fifth Amendment.

The injunction was lifted in April, 1962, after all federal charges had been tried or dismissed.

BLEED THROUGH POOR COPY

Upon my being sentenced in federal court in February, 1962, I immediately appealed to the Ninth Circuit Court of Appeals. Pending the appeal, the Bar held the disbarment proceedings in suspension on the theory that if the conviction was upheld, I would be automatically disbarred. If the conviction was reversed, the disbarment proceeding could be tried thereafter. This was mutually satisfactory to the Bar and to me.

In October, 1964, the Ninth Circuit Court of Appeals issued an opinion reversing my conviction and dismissing all charges as to me. Thereafter, the opinion was redrawn. In February, 1965, the Court of Appeals reversed the conviction entirely, and remanded the matter to the District Court (342 F.2d 309).

I was suspended from the practice of law from the time of my sentencing in February, 1962, in federal court until June, 1965, when my right to practice was restored by the Oregon Supreme Court over the objection of the Bar (240 Or. 555).

The Bar has known since October, 1964, that the Court of Appeals was reversing my conviction in federal court. Except when the trial of this cause was set for early September, 1967, in which month my attorney, Dwight L. Schwab, had 13 cases to try in Circuit Court which had been previously set, which required a continuance, I have not attempted in any way to delay the trial of my disbarment proceeding. It has now been set by the Bar for October 16, 1967.

The Sixth Amended Complaint charges me with 25 causes of complaint. The 25th cause recapitulates the first 24. In the first 24 counts, my conduct is referred to in the following years: 1956—3 counts; 1957—1 count; 1958—9 counts; 1959—4 counts; 1960—5 counts; 1961—1 count; 1962—1 count.

I know of no possible justifiable reason for the delay on the part of the Bar in getting this matter to trial since the Bar knew that my conviction in federal court would be reversed three years ago this month. This delay is highly prejudicial to me in defending myself. Witnesses are gone that would have been available to me several years ago. Other defense witnesses' memories have been dimmed or obliterated by the passage of time. My resources are severely limited, particularly with what I have been through since 1960.

Furthermore, the three years' delay since my case was reversed by the Circuit Court of Appeals must be considered in the light of the previous delay in this case. Three years' delay in itself is burdensome enough, but when it has been preceded by six years' delay since charges were docketed and the Bar decided to act against me, the effect of such further delay is compounded in the extreme.

The Bar must admit that the effect of this delay is all that I claim—that it is impossible to present an adequate defense due to loss of evidence, resulting from the natural effects of passing time. In fact, it has been stipulated by counsel for the Bar (hearing

October 13, 1967, before Trial Committee concerning production of documents) that they will introduce no evidence in support of Count 22 against me, the most recent charge, involving alleged conduct in 1962. The reason given by counsel for the Bar is that during the intervening years its key witness has died.

While the Bar will thus claim that it has similar difficulties, all of the delay since October of 1964 is solely the fault of the Bar, and it does not have the same difficulties which I have. For one thing, the Bar has a paid investigation staff and there are more than three prosecutors working on the case. I have only my attorney and no investigators. Furthermore, all of the material which the federal government had collected by way of information, affidavits, investigation, etc. by the Postal Inspectors, the Federal Bureau of Investigation, the Portland Police Department, the Multnomah County Sheriff's office, and other investigative agencies has been turned over to the Bar by the United States Attorney. The Postal Inspectors had worked on this case for several years prior to my indictment. The FBI had numerous agents rounding up witnesses and evidence.

The Bar and the United States Attorney have always worked hand in hand in connection with the attempts to convict me in federal court and to disbar me. As a result, the Bar is in a situation where the delay is of relatively little consequence to it. It puts me at a very unequal disadvantage. If the Bar had been diligent in this matter, it could easily have

brought the matter to trial within three months after my conviction was reversed in the Circuit Court of Appeals. The Bar's failure to do so has resulted in irreparable damage to me in connection with the trial.

Not only that, it has caused a change of position on my part. I was prepared for, and fully expected, a trial of the disbarment proceeding after my conviction was reversed. With the tolling of the months and the years thereafter, I allowed information which had been gathered to be lost; I did not attempt to keep in contact with witnesses; I attempted to make plans of my own on the assumption that the disbarment proceeding was not going to be pressed. There appeared to be a complete lack of interest in proceeding on the part of the Bar.

I urgently urge that these proceedings be dropped. Failure to do so will deprive me of my basic constitution rights guaranteed by the state and federal Constitutions, and is contrary to all concepts of fairness and justice. To force trial of the disbarment proceeding at this time will deprive me of procedural and substantive due process of law pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and will deprive me of the equal protection of the laws pursuant to the Fourteenth Amendment to the Constitution of the United States, and I will be deprived of my right to a speedy trial guaranteed by the state and federal Constitutions. I will also be deprived of my civil rights as guaranteed and protected by 42 U.S.C.A. Chapter 21.

PHILIP WEINSTEIN

Subscribed and sworn to before me this 14th day of October, 1967.

DOROTHY C. PEDERSEN
Notary Public for Oregon

(SEAL)

My commission expires: 3-17-68

APPENDIX F

Excerpt from Petitioner's Abstract of Record and Brief, Page 38, Filed with Oregon Supreme Court

THE DEMAND FOR DISMISSAL—DELAY IN THE PROCEEDINGS

The issue raised by the Demand for Dismissal filed by the Accused is the most important in this case. Are lawyers in disbarment proceedings, who are threatened by the loss of their professional reputation and livelihood, entitled to the rights of first-class citizenship guaranteed by the Constitution of the United States and the State of Oregon?

Shortly before this case was finally scheduled to be tried, Weinstein filed with the Bar a Demand for Dismissal (Ab. 24) based on the ground that he had been denied his right to a speedy trial, due process and fundamental fairness as guaranteed by Article I, Section 10, of the Constitution of the State of Oregon, the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and the Civil Rights Act, 42 U.S.C. Chapter 21. *Weinstein hereby again reasserts this demand* (Emphasis added).

FILED
APR 22 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1969

No. 1299

In re Complaint as to the Conduct
of
PHILIP WEINSTEIN, Accused,
Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT OREGON STATE BAR IN OPPOSITION

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IN THE

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Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENT OREGON STATE BAR IN OPPOSITION

QUESTIONS PRESENTED

Contrary to the implications of Petitioner's statement of the question presented (Pet. 2), there is no question here of whether lawyers may be denied protection of the Fourteenth Amendment. The Oregon Supreme Court did not so hold, but held that (1) the "speedy trial" provision of the Sixth Amendment did not apply as such to bar disciplinary proceedings and (2) in any event there had been no unreasonable delay in this case.

In Respondent's view the questions presented, stated in an order designed to dispose of the Petition most readily, are as follows:

1. Assuming that the speedy trial provision of the Sixth Amendment applies to state bar disciplinary proceedings, whether the delay prior to the commencement of trial on October 16, 1967, was unreasonable in view of the following circumstances:

a. Petitioner never requested a speedier proceeding but first objected to delay June 16, 1967, immediately following which he requested an additional delay to the date trial commenced.

b. The delay from the filing of the first charges in November, 1960, to April 27, 1965, was caused and procured by and expressly waived by Petitioner; substantial additional portions of the delay were caused by Petitioner's dilatory tactics and refusal to file an answer in violation of the applicable rules of procedure; and the case was inordinately complex, caused in part by the delays previously procured by Petitioner.

c. Some of the most serious charges of which he has been found guilty were first filed in September, 1966, ten months prior to the time the case was set for trial.

d. There was no showing of prejudice and the alleged prejudice was not believed by the triers of the facts.

2. Whether the speedy trial provision of the Sixth Amendment applies as such to state bar disciplinary proceedings in which the ultimate question is the present, as distinguished from the past, character and qualifications of the member of the Bar.

RESPONDENT'S STATEMENT OF THE CASE

Because Petitioner's statement of the case is argumentative, partially interlaced with completely unsubstantiated claims that the Bar was attempting to "coerce" Weinstein, "baying at Weinstein's heels, closing in for the kill" and the like (Pet. 4, 5), and is inaccurate and incomplete, the following is offered:

Contrary to the statement (Pet. 3) that "the" charges were docketed in December, 1958, only some charges here involved were so docketed. In fact, the events of some of the charges had yet to occur at that time—e.g. counts 19, 20, and 21. (See App. E, pp. 55-57). Seven of the counts in the final complaint (counts 12, 13, 15, 18, 21, 23, and 24), representing six counts on which he was ultimately found guilty, were not even filed until the filing of the Fifth Amended Complaint September 21, 1966, about ten months prior to the setting of the case for trial.

Following the classifications of the periods involved set forth in Petitioner's statement of the case (Pet. 4-7), but varying the outer limits of the respective periods

somewhat, Respondent would describe the procedural history as follows:

First Period—November, 1960, to April 26, 1962.

Except for the references to motive, purpose, alternatives available and the like, Petitioner's statement of the basic facts for this period are essentially correct. The Bar was enjoined at the suit of Petitioner from going to trial in the disciplinary proceedings on the theory that Oregon State Bar disciplinary trials should be held in abeyance until after the trial of federal criminal charges involving the same conduct. As mentioned below, this same fact made it inappropriate for the Bar to proceed between the time the Court of Appeals remanded for new trial one count on which Petitioner had been convicted and the date (April 26, 1965) on which that count was dismissed on the government's motion.

Second Period—April 26, 1962, to April 26, 1965.

Petitioner's statement that he "requested that the disbarment trial be held in abeyance until the criminal appeal was decided" hardly does justice to the facts. Between June, 1962, and November 5, 1964, Petitioner filed three motions to and one special request to postpone the trial "until his appeal was decided." (See App. B, pp. 30-32)

Each of the motions (filed June, 1962, August, 1963, and March, 1964,) contained assurances to the Bar re-

lating to the delay. That of March, 1964, is typical and stated as follows:

> "The accused has previously filed with the Board of Governors his affidavit dated August 15, 1963, stating that in the event his conviction is reversed on appeal, and the Board desires to try him, thereafter, he will not raise any question of delay, laches, statute of limitations, or inability to find witnesses by reason of the passage of time. Weinstein reaffirms that statement now." (App. B, pp. 31-32)

Petitioner filed affidavits with each motion and that with the March, 1964, motion stated as follows:

> "I again state that in the event the motion is granted, and then at some subsequent date a trial is held, I will not raise any question of laches, delay, statute of limitations, or inability to find witnesses by reason of the passage of time, nor will I rely on any such defense of that nature whatsoever." (App. B, p. 32)

On November 5, 1964, the promise was renewed in a letter from his attorney as follows: "Weinstein has previously waived any defense of *laches* in regard to any charge against him. Such waivers are again reaffirmed without reservation." (App. B, p. 32) At that time Weinstein was not requesting an early trial but rather was requesting that the entire matter be re-referred to the grievance committee. (App. B, p. 32)

The criminal appeal was not finally determined on rehearing until April 20, 1965. (*See Barnard, et al v. United States* (9 Cir. 1965) 342 F2d 309). Hence, the granting of the Petitioner's motions for continuance was not to October, 1964, as claimed by Petitioner, but rather to April 20, 1965. Furthermore, inasmuch as a charge was remanded for new trial (a) within the spirit of the injunction procured by Petitioner in 1961, it would have been inappropriate to have a trial in the disciplinary proceedings requiring the Accused to testify and disclose aspects of his defense, and (b) within the spirit of Petitioner's requested delays there was no point in proceeding so long as there was a substantial possibility that he would be convicted, making disbarment virtually automatic.

Petitioner deliberately induced the Bar to rely upon his promises never to raise the question of delay, etc.

At its July 13 and 14, 1962, meeting the Board of Governors first denied Petitioner's motion for delay. So, instead of answering the then-pending Third Amended Complaint, and contrary to the nontechnical and informal rules of procedure supposed to apply to disciplinary proceedings he followed up his demand for bill of particulars (filed just before the motion for postponement) with a motion to strike portions of the complaint. (Neither document was authorized by the Bar's Rules of Procedure and even if allowable, they were not sup-

posed to delay the filing of an answer. See Rules 12, 19, 20. (App. F) which were substantially the same during 1960 to 1966). By the time the Fourth Amended Complaint had been filed, various challenges and dilatory motions and an additional demand for bill of particulars had been disposed of and the case had been set for trial for October 1, 1963. Petitioner then filed another of his motions and affidavits repeating the promises and this time the Board of Governors approved the extension of time subject to review from time to time and periodic reports from counsel for Petitioner.

Under these circumstances, it is entirely inappropriate for Petitioner now to refer to the years *prior* to April 26, 1965, as "*this* unseemly delay * * *" (Pet. 4). In fact, it is in violation of the promises and assurances repeatedly given by him and his counsel to his professional association.

Third Period—April 26, 1965, to October 16, 1967.

The chronology of events before the Board of Governors from August 7, 1959, to just prior to trial is set forth in Exhibit 2. The events occurring with Bar Counsel from April, 1965, to that time are set forth in Exhibit 1 entitled "Statement of Mark C. McClanahan." Some of the more important events may be summarized as follows:

1. As a result of the delays procured by Petitioner,

he had created a situation whereby in April, 1965, witnesses would have been describing events occurring between 11 and 4 years prior to the trial of the disciplinary proceedings had such trial occurred immediately thereafter. So, the additional delay thereafter increased these periods for witnesses' memories to, respectively, 13 and 6 years. However, the delay after April, 1965, was in large part attributable to the difficulties which Bar counsel encountered in reconstructing a stale case.

2. The criminal convictions of Weinstein's co-defendants in the mail fraud case, George Barnard, Raymond Knippel and William Lasiter were before this court as late as January, 1966. (See Docket Nos. 310, 345 and 346, October Term, 1965, 382 US 948, 491-492) Their testimony could not be obtained prior to March, 1966, when their depositions were taken. (Exs. 42, 43, 44 and 30.)

3. As the result of the work done after April, 1965, there were deleted from the Fourth Amended Complaint four counts of solicitation, five counts of staged automobile accidents, and one count of general conspiracy for mail fraud. There were added, however, to the Fifth Amended Complaint, present counts 12 (general arrangement on solicitation), 13 (unlawful use of radios), 15 and 18 (acquisition of knowledge of two staged accidents), 21 (procuring fraudulent power of attorney

from Saunders), 23 (improper advances to clients), and 24 (counseling absence of witnesses). Each of those added counts was either based upon, or received substantial corroboration from, depositions and investigations which could not have been made or obtained earlier. In some instances they grew out of the circumstances surrounding the trial of the mail fraud prosecution.

4. The Fifth Amended Complaint, above mentioned, was filed September 21, 1966, whereupon the Secretary of the Bar gave Petitioner notice to answer within 30 days. Contrary to the applicable Rules of Procedure (App. F), *no answer was ever filed to the Fifth Amended Complaint*. Instead Petitioner filed another demand for bill of particulars which, in most respects, was substantially identical or raised the identical or similar issues to those raised on demands for bill of particulars filed June 26, 1962, and November 30, 1962, against the Third and Fourth Amended Complaints, which demands had been denied. This demand requested specification of numerous details with respect to 13 counts in the amended complaint. Efforts were made in December and January to provide some of the items demanded by the bill of particulars which the Trial Committee had earlier denied. As it turned out, the Trial Committee ruled that even further information was to be furnished.

Some of the information was unavailable and after unsuccessful efforts to develop it the Sixth Amended Complaint was filed. (See Count 7 in which alleged runner is identified by description only.)

5. Although at the time of filing the Sixth Amended Complaint (May 17, 1967), for eight months Petitioner had had a virtually identical Fifth Amended Complaint (except for the additional details as to which Petitioner obviously intended to and did file a general denial) Petitioner took a full 30 days (including a one week extension) to file his answer dated June 16, 1967. *This contained the first reference by Petitioner to the matter of delay.* The Trial Committee immediately set the case for trial, but on motion of Petitioner to postpone the trial until October 16, 1967, partly on the ground that the additional delay could make no difference, the postponement was granted. (See Apps. C and D)

6. On October 11, 1967, on the eve of trial, the Accused filed an extremely broad motion to produce and on the same day filed an injunction suit to prevent the motion from being heard and the trial from being held. On October 16, 1967, the day set for trial at Petitioner's request, the "Demand for Dismissal" (Appendix E to the Petition) was first filed. It was denied the same day and trial commenced. (Tr. 2, 5, 50-53)

ARGUMENT

I.

Assuming the Speedy Requirement of the Sixth Amendment Applies, There Was No Unreasonable Delay.

A. *The time for computing the period of delay could not have commenced prior to June 16, 1967, and there was no significant delay thereafter.*

Even if this were a criminal proceeding, one indisputable fact itself shows that there has been no violation of the Sixth Amendment guarantee: Petitioner never asked for a trial setting; in fact he never asserted any contention relating to the Bar's delay until his answer filed June 16, 1967, and there was no significant delay after that date. On June 30, 1967, it was decided (Ex. 2), and on July 5, 1967, official notice was given that trial would commence September 3, 1967 (App. C). At that point counsel for Petitioner filed a motion to *postpone* the trial from September 6 to October 16 and the Trial Committee, that day, entered an order resetting the trial for October 16, 1967. Note that the Accused did not seek an *earlier* date to obviate his counsel's schedule problems. Instead he asked for trial on or after October 16—partly on the stated ground that "*for it to be set over another month or so would not cause meaningful additional hardship or difficulty.*" (App. D, Affidavit of Dwight L. Schwab)

The decisions of the Courts of Appeals interpreting the Sixth Amendment appear unanimous that a criminal defendant cannot complain of delay prior to the date that he requests a prompt trial. *United States v. Della Rocca* (2 Cir. 1968) 388 F2d 525, 527 (vacated on other grounds 390 US 745, 20 L Ed 2d 274); *United States v. Lustman* (2 Cir. 1958) 258 F2d 475, 478, cert den (1958) 358 US 880, and cases from the various circuits cited therein. The reasons were described in *Lustman* as follows:

> "The requirement of a demand, leading to a trial on the merits when the defendant has not complained of the delay, 'stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection.' Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 853 (1957)." (258 F2d 478)

As noted by the present Chief Justice when sitting as a Court of Appeals Judge "Generally a speedy trial claim is waived unless the right is asserted promptly." *Mathies v. United States,* (DC App. 1966) 374 F2d 312, 314, fn 1.

Petitioner apparently relies not on his June, 1967, Answer, but on his "Demand for Dismissal" which he refers to as having been "timely." (Pet. 3) A demand for dismissal filed the day of Trial comes too late. *Harlow v. United States* (5 Cir. 1962) 301 F2d 361, 367, cert

den 371 US 814; *Fleming v. United States* (1 Cir. 1967) 378 F2d 502, 504 (and cases cited therein).

This Court appears consistently to have denied certiorari in purely criminal cases in which the accused failed to request a speedier proceeding until shortly before trial. See *United States v. Lustman, supra., United States v. Wilson* (2 Cir. 1965) 342 F2d 782, cert den 382 US 860; *D'Erocle v. United States* (2 Cir. 1966) 361 F2d 211, cert den 385 US 995; *United States v. Smalls* (2 Cir. 1966) 363 F2d 417, cert den 385 US 1027; *United States v. Maxwell* (2 Cir. 1967) 383 F2d 437, cert den 389 US 1057; *United States v. McIntyre* (2 Cir. 1968) 396 F2d 859, cert den 393 US 1054; *Harlow v. United States, supra.; United States v. Jones* (7 Cir. 1968) 403 F2d 498, cert den 394 US 947; *United States v. Aadal,* (2 Cir. 1969) 407 F2d 381, cert den 394 US 1008, 395 US 967.

This case is therefore not an appropriate one in which to decide the basic constitutional question posed by Petitioner as to the applicability to the disciplinary proceedings of the Sixth Amendment's speedy trial guarantee. Even if the point were conceded Petitioner could not prevail because he failed to demand a speedier proceeding. This is required even of persons accused of crime in genuine criminal proceedings.

B. *There was no unreasonable, arbitrary or oppressive delay.*

An alternative basis for the Supreme Court of Oregon's decision was stated as follows:

> "It is unnecessary to define in this case the proper remedy for vexatious and unreasonable delay on the part of the Bar. *None has been shown in this case.*" (Pet. App. B, p. 17; emphasis supplied.)

It is evident that the court was applying standards from its own prior decisions such as *State v. Evans* (1968) 249 Or 314, 432 P 2d 175, which in turn had relied on decisions of this Court as to what constitutes an unreasonable, unconstitutional delay in criminal cases.

1. The tests.

There is no mechanical formula or Knee-jerk reaction that can determine that any particular passage of time is excessive under the Sixth Amendment. There are no conclusive presumptions based on delay alone. One of the most famous statements of the applicable test was by Mr. Justice McKenna in *Beavers v. Haubert* (1904) 198 US 77, 87:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses * * *."

That case involved multiple indictments and has some relationship to a multiple count complaint in a disciplinary proceeding.

In *Pollard v. United States* (1957) 352 US 354, 361, this Court stated that the Sixth Amendment proscribes only "purposeful or oppressive" delays.

More recently Mr. Justice White has stated in *United States v. Ewell* (1965) 383 US 116, 120:

> "We cannot agree that the passage of 19 months between the original arrests and the hearings on the later indictments itself demonstrates a violation of the Sixth Amendment's guarantee of a speedy trial. This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."

The "oppressive" element, which usually relates to incarceration, is difficult to find in a disciplinary proceeding—especially when the accused is entitled to and does practice in the interim. Thus *Arden v. State Bar of California* (1959) 52 Cal 2d 310, 341 P2d 6, 10, apparently involved a two or three year delay in discipli-

nary proceedings. Although no constitutional issues were raised the case is significant because it held that a delay violating the Rules of Procedure of the Bar was not "jurisdictional." One of the reasons assigned was that the attorney had engaged in active practice while the charges were pending.

Recent attempts to list the factors to be considered on claims of unconstitutional delay are *United States v. Deegan* (DC SD NY, 1967) 279 F Supp 53, 58 and *United States v. Verville* (DC ED Wis, 1968) 281 F Supp 591. These cases list the following factors:

1. The length of the delay.
2. The reasons for the delay.
3. The prejudice to the defendant resulting from the delay.
4. The extent of waiver by the defendant.

The *Verville* case involved eight and one-half years from the return of the indictment to the hearing on the question of speedy trial. Like the Accused in this case the defendant there had selected a particular 21 months as a "inexplicable" delay, but the court weighed the factors and found no violation of his constitutional rights.

The prejudice factor is heavily influenced by the degree to which the Accused can recall the events. *United States v. Feinberg* (2 Cir. 1967) 383 F2d 60, in-

volved a pre-arrest delay of five and one-half years which the court said was less serious than delay after arrest and confinement. It is relevant here because some of the delay in the present case was pre-prosecution in that several of the counts were not included until the Fifth Amended Complaint filed in 1966. The court commented as follows:

> "Feinberg, though given every opportunity to domonstrate prejudice, was able only to point to isolated instances of diminished recall, notably when confronted with his prior inconsistent statements to state authorities; none of these instances dealt with essential matters in dispute. He, an educated, middle-aged businessman, was able to testify with specificity as to the events in criminal transaction. The extent of any damage appellant might have suffered through the delay here is mitigated by the fact that defendant was placed on notice on July 21, 1960, one week after the completion of the offense, by a state official, during the course of the interview which resulted in appellant's formal statement, that he would be called to answer for his participation in the transaction, and this interview was followed within a few weeks by a similar visit from federal agents." (383 F2d 66)

The passage of time alone does not establish the impossibility for a fair trial. *Fouts v. United States* (6 Cir. 1958) 253 F2d 215 (10 year delay).

In view of the many factors involved and the special position of the trial tribunal to know who is responsible

for the delays, a decision of such tribunal to deny a demand for dismissal for unreasonable delay will be reversed only for an abuse of discretion. *Nickens v. United States* (DC App. 1963) 323 F2d 808, 811, cert den 371 US 896; *York v. United States* (9 Cir. 1968) 389 F2d 761, 762.

2. The relevant period.

The circumstances of the delay in this case have been described in the Statement of the Case above. The relevant period we submit commenced April 26, 1965, when the government dismissed the remaining criminal count. Prior to that time it would have been contrary to the principles established in the 1961 injunction proceedings and contrary to the mutual understanding of Petitioner and the Board of Governors to have attempted to try the *Weinstein* case. The period ends, we believe, in June, 1967, when the case was first set for trial, only to be postponed at Petitioner's request. However, not all of the intervening 26 months should be counted. That caused by an accused is not unreasonable, purposeful or oppressive delay against which the Sixth Amendment is directed. *Powell v. United States* (DC App. 1965) 352 F2d 705, 709; *Smith v. United States,* (DC App. 1964) 331 F2d 784, 789.

Petitioner's filing of authorized demands for bills of particulars, motions to quash depositions and the like

and his refusal to comply with the rule that he was to answer the Fifth Amended Complaint have been described in this statement of the case above. If it can be said that Petitioner had some proper reason for these tactics, it must also be recognized that the delay resulting therefrom was not purposeful or oppressive or unreasonable delay on the part of Bar counsel.

3. Petitioner's claim of prejudice.

In genuinely criminal cases the accused has a heavy burden in showing prejudice as justification for dismissal for unreasonable delay. See *Fleming v. United States* (1 Cir. 1967) 378 F2d 502.

Petitioner's affidavit in support of his demand for dismissal (Pet. App. E p. 30) was both insufficient and justifiably disbelieved by the Trial Committee and Board of Governors. For one thing, that affidavit (page 5) claimed that at some time after the reversal of this conviction "I allowed information which had been gathered to be lost; I did not attempt to keep in contact with witnesses; I attempted to make plans of my own *on the assumption that the disbarment proceeding was not going to be pressed.* There appeared to be a complete lack of interest in proceeding on the part of the Bar." The Trial Committee knew how improbable this statement was. In fact, his counsel, in arguing the demand, stated that after the Court of Appeals decision:

> "* * * although Weinstein would like to have had the charges dropped against him, and has suggested that they be dropped, it has been made clear to Weinstein on a *number of occasions* that they were not going to be dropped and that he *would be tried*." (Tr. 13)

As of what time could Petitioner's affidavit possibly be true?

After he was reinstated by the Oregon Supreme Court in June, 1965, he was notified by the Secretary of the Bar July 1, 1965, that his most recent request (of June 8) for dismissal was "denied," and that counsel for the Bar had been instructed to bring it to trial at the earliest possible moment. (Ex 3). From August, 1965, a special investigator hired by the Bar worked on the case. On February 4, 1966, the Board refused the February 3, 1966, request for dismissal (which was not based on claimed delay). In March and April, 1966, the depositions of the two Barnards, Knippel and Lasiter were taken and hearings held on the motions to quash or destroy them were had, and Weinstein testified at the trial that he had read these depositions "a matter of months" after March, 1966 (Tr. 2674-75). We submit that examination of those depositions (Exs. 30, 42-W) would indicate to the examiner that it was highly unlikely that the proceedings would be dropped at that point. Then, in September, 1966, the long awaited Fifth Amended

Complaint was filed, followed by the proceedings on demand for bill of particulars described above.

Weinstein also testified that after his reinstatement he resumed active practice in 1967. (Tr. 2626).

The trial also failed to bear out the statements that evidence had been lost and that witnesses were unavailable. Not a single witness or item of evidence was mentioned in the trial as having once existed or been available which he was precluded from presenting.

It is true that a few witnesses, especially John Traver and Louis Zahn, appeared to have extremely poor memories at the trial. The result, however, was to lessen the evidence against the Accused, for in their 1959 and 1960 statements they had given stronger evidence against him. (See App. E p. 63)

As for the Accused, he demonstrated a remarkable memory.

The Trial Committee findings and observations on the issue of delay are set out in Appendix E at pp. 61-63. It is clear that the Trial Committee recognized that the delay involved had helped, not hurt the accused and that it did not believe his claim of prejudice.

The Petition refers to the instructions and requests which the Board of Governors gave to Bar counsel with respect to filing the Fifth Amended Complaint. There

is a difference, however, between planning to file an amended complaint involving 29 counts, and being able to do it on an informed basis—especially after the case has become stale by the four or five year delay from 1961—a delay for which the Accused is solely responsible. This applies not only to the addition of charges but to the deletion of those once seriously made. Furthermore, how could the Bar have kept many of the rather devious witnesses in this case constantly located or under subpoena?

The voluminous record in this case should be considered.

One indicator of the time required to prepare this case for trial is the fact that it took over six months for Petitioner, as well as the Bar, to file the post-trial brief with the Trial Committee. Furthermore, one basis for Petitioner's request to postpone the trial from September, 1967, to October, 1967, was that "Many of these charges involve complicated and lengthy matters * * *." (App. D p. 40, Affidavit of Dwight L. Schwab)[1]

The "circumstances" which govern the question of unreasonable delay include, of course, the complexity of the matter. This one involved the complexities of the fed-

1. The Petition (especially at pages 10-11) contains many unsupported misstatement of fact. The failure to respond herein is not intended as an admission of their correctness but results from their irrelevance. Counsel for Petitioner *knows* that at least the statement regarding "five full-time prosecutors" (Pet. 10) and Weinstein's "one" attorney are false.

eral trial and many more. Consideration should also be given to the fact that during the period of this alleged delay the ground rules were substantially changed by the decision of *Spevak v. Klein*, (Jan. 1967) 385 US 511, which effectively prevents discovery of evidence by compelling the production of documents or testimony from the Accused. The court should consider further the necessities of a disciplinary system dependent on uncompensated members of the Trial Committee and Bar counsel and the desire to reduce the costs of the proceedings through the utilization of the Bar Office for typing and duplication of pleadings.

Most important, the accused in a disciplinary proceeding should not be allowed to use a right to speedy trial as a sword instead of a shield. Of all the persons and types of cases in our society a lawyer in a disciplinary proceeding brought by his professional association is best able to deal candidly and fairly on the issue. If he wants an earlier trial it is not too much to ask that he request it as a condition to his right to complain of delay.

II.

The Sixth Amendment's Guarantee of Speedy Trial Neither Applies to Bar Disciplinary Proceedings Nor Requires Dismissal.

The first and apparently the preferred ground for

decision of the Oregon Supreme Court was that the Sixth Amendment's guarantee of a speedy trial in "criminal prosecutions" is not applicable to bar disciplinary proceedings and in any event would not require that dismissal be the proper remedy. As stated by the Court:

> ". . . If the conduct of a member of the Bar disqualifies him from the practice of law, it would not be in the public interest to dismiss the disciplinary proceedings for no reason other than the Bar's failure to prosecute them with the proper dispatch." (Pet App B p 18)

Of course, there is no case holding that a Bar disciplinary proceeding is a criminal prosecution. Some of the language of *Spevak v. Klein,* (1967) 385 US 511, 516, and *In re Ruffalo,* (1968) 390 US 544, 551, has given Bar associations serious concern, but it is not believed that these decisions have changed the basic character of the proceedings from civil and protective to criminal and punitive. See Niles and Kay, "Spevak v. Klein: Milestone or Millstone in Bar Discipline?" 53 ABA Jour 1121, 1124 (December, 1967).

This, of course, is a question of great importance as is the remedy which would follow from an application of the Sixth Amendment's speedy trial provision as such to Bar proceedings. We submit that this is not an appropriate case for reaching that question.

CONCLUSION

The Petition should be denied. Petitioner procurred the delays from 1960 to April 26, 1965, and expressly promised the Bar never to raise the issue of delay if it would just postpone the trial. He thereafter did raise the issue but for the first time on June 16, 1967; then he requested the only delays which occurred thereafter. He is seeking to use the Sixth Amendment as a sword instead of a shield.

Even if this were a criminal proceeding, the Petitioner could show no violation of his rights. The case is, therefore, an inappropriate vehicle for determining whether the speedy trial provision applies to bar disciplinary proceedings or, if so, what remedy for violation of it would still protect the unsuspecting public from a lawyer found to be dishonest and dangerous.

Respectfully submitted,

GEORGE W. MEAD
MARK C. McCLANNAHAN
MICHAEL J. WALSH

Counsel for Respondent
Oregon State Bar

APPENDIX A

(Excerpts From Motion Filed May 6, 1965)

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Reinstatement of PHILIP WEINSTEIN to the Practice of Law.	MOTION OF PHILIP WEINSTEIN FOR ORDER OF REINSTATEMENT TO THE PRACTICE OF LAW

Comes now PHILIP WEINSTEIN and moves this court for an order reinstating him to the practice of law in the State of Oregon.

* * *

By letter of February 9, 1962, to the Clerk of this court, the Oregon State Bar transmitted a certified copy of Weinstein's conviction under said indictment, and requested summary suspension of Weinstein pursuant to Rule I of the Rules of Admission of Attorneys (235 Or., page 20 of Rules of Admission).

Based upon the certified copy of conviction, on February 13, 1962, this court summarily suspended Philip Weinstein, without notice or hearing, from the practice of law pursuant to Rule I of the Rules of Admission of Attorneys (Vol. 36, Oregon Supreme Court Journal, page 246). On February 13, 1962, the Clerk of this court informed the Oregon State Bar that Philip Weinstein

had been suspended that date pursuant to the provisions of Rule I.

By letter to the Clerk of this court on April 28, 1965, Weinstein transmitted a certified copy of the order of the District Court of the United States for the District of Oregon, dated April 26, 1965, dismissing said indictment against Weinstein.

* * *

Philip Weinstein was summarily suspended without hearing solely based on said conviction. The conviction no longer exists. It is wiped out. The reason for the suspension is gone just as though it never existed. He is entitled to reinstatement in the same summary manner as he was suspended. To refuse, or to delay, such reinstatement violates his rights as above set forth.

Dated May 6, 1965.

/s/ DWIGHT L. SCHWAB
Dwight L. Schwab
Hutchinson, Schwab & Burdick
712 Executive Building
Portland, Oregon 97204
Tel: 226-2926
Attorneys for Philip Weinstein

Motion allowed. See *In re Weinstein* (1965) 240 Or 555, 402 P2d 751).

APPENDIX B

(Excerpts from Answer to Sixth Amended Complaint filed June 16, 1967)

FIRST DEFENSE

I

"Laches—This matter has been docketed with the Oregon State Bar since January, 1959. Accused was originally served with complaint herein in November, 1960. In January, 1961, accused was indicted in the United States District Court for the District of Oregon for conspiracy, mail fraud, and using information gained from public radio, along with 14 other defendants. The trial for mail fraud (fraudulent collision claims) and conspiracy commenced September 12, 1961, and lasted until November 10, 1961. The trial resulted in conviction of accused on four counts. Accused was sentenced in February, 1962, to eight years in the penitentiary, together with a fine. Upon sentence he was immediately suspended from practice of law by the Oregon Supreme Court.

II

In October, 1964, the Ninth Circuit Court of Appeals promulgated an opinion reversing the conviction and dismissed all charges as to Weinstein. Thereafter, the opinion was redrawn. In February, 1965, the Court of Appeals reversed the conviction and remanded the matter to the District Court for a new trial on one count (342 F2d 309).

III

In July, 1961, after the accused had been indicted, and after the Bar had filed its second amended complaint which newly incorporated all the matters upon which the accused had been indicted, the Bar attempted to force this disbarment proceeding to trial prior to the

trial in federal court. As a consequence, the accused petitioned the District Court of the United States for the District of Oregon to enjoin the Oregon State Bar from forcing the disbarment case to trial (Weinstein v. Oregon State Bar, Case No. 61-306). A temporary injuction was granted to the accused in July, 1961, against the Oregon State Bar and other defendants. A hearing before a three-judge panel in December, 1961, resulted in an injunction against the Bar, the Board of Governors, the Trial Committee and the prosecutors. Although Weinstein had been convicted on certain charges, others remained to be tried. The injunction was lifted in April, 1962, after all federal charges had been tried or dismissed.

IV

In June, 1962, the accused moved the Board of Governors for an order continuing the trial until his appeal was decided by the Ninth Circuit Court of Appeals. The reason for the motion was that it would obviate the necessity of a disbarment trial if the appeal were denied inasmuch as the accused would be automatically disbarred pursuant to the rules of the Oregon Supreme Court by reason of his conviction. In the meantime, he was suspended from practice by order of the Supreme Court under the rules.

V

In his motion of June, 1962, the accused stated, among other things, as follows:

> 'The accused makes this motion in good faith. In the event his said conviction is subsequently reversed on appeal, and the Board thereafter desires to try him, he will not raise any question or defense of delay, laches, statute of limitations, or inability to find witnesses to testify in his behalf by reason of the passage of time.'

And in an affidavit which was attached to the motion, the accused on June 28, 1962, stated as follows:

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'I particularly state that in the event the motion is granted, and then at some subsequent date a trial is held, that I will not raise any question of laches, delay, statute of limitations, or inability to find witnesses by reason of the passage of time, nor will I rely on any such defenses of that nature.'

VI

Thereafter, in August, 1963, the accused again moved the Board to continue the trial to a time subsequent to the determination of the appeal by the Ninth Circuit Court of Appeals. In this motion the accused stated:

'On or about June 28, 1962, accused filed with the Board his motion and affidavit stating that in the event his conviction is reversed on appeal, and the Board desires to try him thereafter, he will not raise any question of delay, laches, statute of limitations, or inability to find witnesses by reason of the passage of time. Accused reaffirms that statement now.'

And in an affidavit dated August 15, 1963, which was attached to the motion, the accused stated as follows:

'I again state that in the event the motion is granted, and then at some subsequent date a trial is held, I will not raise any question of laches, delay, statute of limitations, or inability to find witnesses by reason of the passage of time, nor will I rely on any such defense of that nature.'

VII

In March, 1964, accused again moved the Board for an order continuing the trial until after the Circuit Court of Appeals had decided the appeal, and stated in part as follows:

'The accused has previously filed with the Board of Governors his affidavit dated August 15, 1963, stating that in the event his conviction is reversed

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on appeal, and the Board desires to try him, thereafter, he will not raise any question of delay, laches, statute of limitations, or inability to find witnesses by reason of the passage of time. Weinstein reaffirms that statement now.'

And the accused in an affidavit attached to the motion stated as follows:

'I again state that in the event the motion is granted, and then at some subsequent date a trial is held, I will not raise any question of laches, delay, statute of limitations, or inability to find witnesses by reason of the passage of time, nor will I rely on any such defense of that nature whatsoever.'

VIII

On November 5, 1964, shortly after the Ninth Circuit Court of Appeals had published its first opinion which reversed Weinstein's conviction and dismissed all charges against him, counsel for the accused wrote the Board of Governors as follows:

'As attorney for Philip Weinstein, I am enclosing a copy of the opinion of the United States Court of Appeals for the Ninth Circuit in the case of Philip Weinstein, et al v. United States, No. 17746, dated October 29, 1964.

It is respectfully suggested that the Board of Governors submit the matter of disciplinary charges against Weinstein to the grievance committee for re-evaluation.

I feel that with additional information available and in the interest of justice such a procedure would be appropriate.

Weinstein has previously waived any defense of *laches* in regard to any charge against him. Such waivers are again reaffirmed without reservation.'

IX

The first twenty-four causes of complaint in the sixth amended complaint refer to conduct of the accused in the following years: 1956 — three counts; 1957 — one count; 1958 — nine counts; 1959 — four counts; 1960 — five counts; 1961 — one count; 1962 — one count. The twenty-fifth (last count) merely recapitulates the first twenty-four causes of complaint.

X

The accused has not previously raised the matter of laches since his above motion of June, 1962. However, by reason of the conduct of the Bar since the Ninth Circuit Court of Appeals reversed the conviction, the accused now pleads laches herein. Accused, by his waiver of laches as set forth above, never intended to, and did not, condone delays subsequent to the reversal of the conviction by the Court of Appeals.

APPENDIX C

BEFORE THE BOARD OF GOVERNORS
OF THE OREGON STATE BAR

In Re: Complaint as to the Conduct of PHILIP WEINSTEIN, Accused	No. 699 NOTICE OF TRIAL

To: PHILIP WEINSTEIN, Accused, and DWIGHT L. SCHWAB, his counsel, and to GEORGE W. MEAD, MARK C. McCLANAHAN and MICHAEL J. WALSH, counsel for the Oregon State Bar:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED, AND WILL PLEASE TAKE NOTICE, that the above-entitled proceeding will come on for trial on Wednesday, September 6, 1967, at the hour of 9:30 a.m. at the offices of the Oregon State Bar, 808 S.W. 15th Avenue, Portland, Oregon 97205.

Dated this 5th day of July, 1967.

R. R. BULLIVANT,
Chairman, Trial Committee

APPENDIX D

(Motion Filed July 11, 1967)

BEFORE THE BOARD OF GOVERNORS
OF THE OREGON STATE BAR

In Re: Complaint as to the Conduct of PHILIP WEINSTEIN, Accused.	No. 699 MOTION TO RESET TRIAL

The accused, Philip Weinstein, by and through his attorney of record, Dwight L. Schwab, moves the Board for an order resetting the trial of the above matter to a time subsequent to October 6, 1967.

Attached hereto and made a part hereof is the affidavit of Dwight L. Schwab.

/s/ DWIGHT L. SCHWAB
Dwight L. Schwab
Of Counsel for Accused
Philip Weinstein

The original and two copies were mailed to Rupert R. Bullivant 7-10-67

BEFORE THE BOARD OF GOVERNORS
OF THE OREGON STATE BAR

In Re: Complaint as to the Conduct of PHILIP WEINSTEIN, Accused.	No. 699 AFFIDAVIT OF DWIGHT L. SCHWAB

STATE OF OREGON)
) ss.
County of Multnomah)

I, DWIGHT L. SCHWAB, being first duly sworn on oath depose and say:

I am counsel for the accused Philip Weinstein, and have been since charges were first preferred against him in 1960.

On Friday, July 7, 1967, I received notice that trial of Weinstein's disbarment proceedings had been set commencing Wednesday, September 6, 1967. This is the first notification I had that the trial was being set on that date.

It is requested that trial be set over to a time subsequent to Friday, October 6, 1967, for the following reasons:

Prior to July 7, 1967, I had received notification of the following eleven trials during the month of September and early October, 1967. All of these trials are in Circuit Court of the State of Oregon for the County of Multnomah:

Tuesday, September 5, 1967:

1. Joan Johnson v. Terry Sicilia, et al, No. 312-360
2. Linda Johnson v. Terry Sicilia, et al, No. 312-361
3. Joan Johnson, Administratrix, v. Terry Sicilia, No. 312-362

Monday, September 11, 1967:

4. Kareen Armstrong v. Dr. John M. Bubalo, No. 327-593

Wednesday, September 13, 1967:

5. George Kuhns v. Standard Oil Co., et al, No. 310-684
6. Esther Kuhns v. Standard Oil Co., et al, No. 310-685

Monday, September 18, 1967:

7. Lance Viert, by Guardian, v. Continental Rent-a-Car of Portland, Inc., No. 317-265
8. Dorothy Schnell v. Goodwill Industries of Oregon, No. 325-449

Thursday, September 21, 1967:

9. James A. Cowan v. Lauris A. Cowan, No. 328-231

Monday, October 2, 1967:

10. Edward R. Armstrong v. Dr. John M. Bubalo, No. 327-594

Wednesday, October 4, 1967:

11. Rose Keep, et al v. Northwest Natural Gas Co., et al No. 320-125

There are twenty-five charges in the disbarment complaint by the Bar against Weinstein. Many of these charges involve complicated and lengthy matters covering many events and long periods of time. I do not see how the disbarment charges can be tried in less than four weeks.

All of the above Circuit Court cases were set for trial prior to any notification from the Bar that a trial was anticipated in the Weinstein case. All parties have been notified.

I am well aware that Weinstein has pleaded laches. Weinstein would like to get this matter disposed of. However, to require that the disbarment case go to trial on September 6, 1967, would work a hardship on a number of my clients and a large number of other lawyers and clients. The Weinstein matter has been delayed for years. For it to be set over another month or so would not cause meaningful additional hardship or difficulty.

I am the only person that can try the above cases. They have all been personally handled by me from the beginning. Neither of my partners have any acquaintance with the matters and have not handled any of the cases at all.

/s/ DWIGHT L. SCHWAB
Dwight L. Schwab
Of Counsel for Accused
Philip Weinstein

Subscribed and sworn to before me this 10th day of July, 1967.

/s/ DOROTHY C. PEDERSEN
Notary Public for Oregon
My Commission Expires: 3/17/68

APPENDIX E

Findings, Conclusions and Recommendations of Trial Committee Entered July 11, 1968

(Omitting formal parts).

In deciding upon the charges in the Sixth Amended Complaint, we have somewhat rearranged the order in which they there appear.

As will be observed, this opinion finds the accused guilty of several of the charges, and not guilty as to others. Some of the offenses for which guilt is found, if considered alone, appear not to be serious enough to warrant disbarment or more than some minor type of punishment or reprimand. However, when all of them are considered together, a very serious pattern of conduct appears. This is not necessarily disclosed in the formal language of each specific charge or cause of complaint.

COUNTS 1, 2, AND 3—DELAY IN ACCOUNTING TO STATE INDUSTRIAL ACCIDENT COMMISSION

The essence of the three charges is that the accused, while representing injured workmen having claims against third persons, other than their employer, had knowledge of the interest of the Industrial Accident Commission in the involved causes of action, effected settlements with the third party defendant, and remitted to his client without making payment to the Commission until after the making of repeated demands by the Commission and under circumstances when he either knew or should have known of the claim of the Commission to the funds involved. This is charged to have occured approximately from 1956 to some time in 1960, with the accused paying the Commission in April 1960.

The charges of the Bar were proven, except for the Mackrodt case (Count 2) and that portion of the charges

asserting the conversion or misuse of the settlement proceeds.

As to Counts 1 and 3, it is clear that the accused was careless and certainly should have known of the interest of the Accident Commission before he remitted to his clients. The forms, agreements and statements used by the Commission in the handling of third party claims apparently were all in his possession, but he claims that he, in ignorance of such claims, paid his clients on the basis of their assurances that they had received no Industrial Accident moneys.

It is difficult, however, to avoid the conclusion that Weinstein was highly reckless in looking after the interests of the Accident Commission or in requiring that his clients do so as to Counts 1 and 3.

While the Committee is not willing to make a finding of improper conversion or diversion of funds, because of uncertainty in the law as to their nature, it finds that Weinstein's conduct was reckless under the circumstances and not up to the standards which should have been maintained by an honest, conscientious attorney. It is possible that the statutory lien given to the Commission converts recoveries into trust funds. If the reviewing bodies feel that this is the law, then a misuse of funds has occurred.

COUNT 23, THE MAKING OF IMPROPER LOANS AND ADVANCES TO CLIENTS, AND COUNT 12, IMPROPER SOLICITATION OF BUSINESS THROUGH GEORGE BARNARD AND RAYMOND KNIPPEL

While the evidence to support these charges is to a considerable degree circumstantial, they were adequately proven, and the accused is found guilty as to each.

The brief of the State Bar, pages 3 to 16, inclusive, adequately sets forth the evidence showing the impropriety of the loans made. The activity involved in both counts took place in 1958, 1959 and 1960.

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It is believed that the evidence shows that the purported loans were in fact intended as payment or compensation to runners and were made primarily for the purpose of obtaining law business by solicitation. George Barnrad, Knippel and Portland Police Officer, Traver, repeatedly sent cases to Weinstein on the basis of their own solicitation. These solicitors all received substantial and repetitive loans from Weinstein purportedly against the security of pending claims or cases. It taxes our credulity to believe that these were good faith loans to clients in need of money. No serious effort was made by Weinstein to show that any of these solicitors were in need of funds, or to produce records or other evidence demonstrating these to be real loans.

These same solicitors let it be known at accident scenes and at other places where solicitation occurred that Weinstein made a practice of loaning money to clients.

By the making of these very generous loans to people who were sending him a substantial volume of clients and by the widespread making of loans to many clients, it is clear that Weinstein used this device for the improper purpose of soliciting and obtaining law business.

It is also found that Weinstein knew of the improper solicitation activities of these three persons, that he knowingly accepted the fruits of their labors, and, in fact, paid for their services by the making of so-called loans to them.

The loans before this Committee, all of which were in violation of Rules and Canons of Ethics of the Bar, had, we emphasize, insidious, degrading aspects, much deeper than the moral principles underlying the Canons. They not only fostered litigation and gave Weinstein an interest adverse to his client, but were obviously made to persons for the very purpose of encouraging runners or solicitors such as Barnard, Knippel and Traver to bring cases into his office. The loans to these solicitors were nothing but thinly disguised payments for services rendered.

We think it significant that Weinstein did not himself try any of the many cases in his office. Therefore, cases could not continue to come to him because of any reputation for trial ability, a factor which properly brings business to a lawyer.

We further find that the specific instances of solicitation of Woodson Wilson, Jim Rasmussen and James Lahey (described in Bar Brief, pp. 69-74) were proven, though not specified and charged as separate counts.

COUNT 13—USE OF RADIOS TO INTERCEPT POLICE ACCIDENT MESSAGES

While the evidence is conflicting, we find that Weinstein knew of the use of radios by George Barnard and Knippel to intercept police accident messages, and that he knowingly accepted law business drummed up for him at accident scenes by these runners.

CAUSES OF COMPLAINT 5 AND 8—IMPROPER SOLICITATION BY OFFICER TRAVER

The improper loans and their use to foster and pay for solicitation, such as through solicitors George Barnard and Knippel, previously discussed, is emphasized and further clarified in evidence concerning these two counts charging improper "running" for Weinstein by Officer Traver, then of the Portland Police force, in 1956. It is not clear to the Committee why Weinstein was not charged by the Bar with a conspiracy or standing arrangement with Traver to "run" cases for him, as occurs in the complaint concerning charges involving solicitation by George Barnard and Knippel.

Be that as it may, the evidence, which we accept, although circumstantial, shows that such an arrangement existed. The two specific offenses, of which Weinstein is found guilty, were, we think, only part of a much larger number of cases which Traver solicited for Weinstein involving accidents he investigated as a Portland Police Officer, in 1956 and 1957.

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Traver, again, as in the case of George Barnard and Knippel, received substantial and periodic payments from Weinstein, attempted to be explained as loans against pending cases, which are found to have in fact been payments for the illegal solicitation of law business. The Bar's study of Weinstein's cases in May, 1956, to August, 1957, rather convincingly shows that of the 36 city investigated Multnomah County cases filed by him, Traver investigated 14 of the accidents, resulting in 19 Weinstein cases. (See State Bar Br., p. 36). This must have involved more than the activities of an old client, a police officer acting in violation of Portland City Police Department rules, rules of a department with which Weinstein had very close contact.

Again, the loans themselves were too periodic, not based on need, an *[sic]* not shown to be related to the worth of pending cases, to be accepted as bona fide loan transactions.

While the specific counts involving Haas and Crale concern testimony that is circumstantial and not as clear as it might be, the background dealings of Weinstein and Traver convince us that Weinstein is guilty as charged and that he was a party to a general solicitation agreement or arrangement with Traver, paid for by loans.

COUNT 11—SOLICITATION BY DEPUTY SHERIFF TRAVIS OF VERA ZAHL

Our finding is not guilty for failure of proof. The failure here was to show that Deputy Multnomah County Sheriff Travis did in fact solicit Vera Zahl, the alleged accident victim, in November, 1959, as charged by the Bar.

It should be here observed that Deputy Travis, charged as the solicitor or runner, was another Weinstein client who had occasion to be at accident scenes frequently, for whom Weinstein was handling supposed injury claims, and to whom Weinstein made so-called "loans" in varying amounts from time to time. Wein-

stein did not produce his records to show any correlation between the nature of the claims or the amount received from them, as compared to the loans.

COUNT 6—JACK RYDER SOLICITATION OF MRS. HAINES

The finding is guilty, largely on circumstantial evidence outlined in Bar Brief pp. 74-76. Jack Ryder was identified as a sub-solicitor employed by George Barnard in his running activities for Weinstein and others. While the evidence as to this particular episode which took place in July, 1959, is highly circumstantial, because of our view as to the existence of a general arrangement between Weinstein and George Barnard, we think the circumstantial evidence tips the scale in favor of guilt.

COUNT 7—SOLICITATION OF ALBERTA COX BY AN UNNAMED SOLICITOR

The finding is not guilty by reason of failure of proof.

COUNT 9—SOLICITATION OF JAMES WILSON BY GEORGE BARNARD

This specific charge was, again, proven by circumstantial evidence. However, guilt is found here as an instance where solicitation on the accused's behalf by Barnard did occur, even though the accident victim actually went to another lawyer, in a case in which Weinstein represented the *other* driver in the same accident. The episode occurred in July, 1958.

COUNT 10—SOLICITATION OF SALSMAS BY GEORGE BARNARD

The accused is found guilty of this charge. Here is an instance occurring in July, 1960, where the solicitation by George Barnard on Weinstein's behalf (described by the Salsmas in great detail) was not successful, because the prospective clients became suspicious and went to another lawyer.

While, for reasons elsewhere stated, we place little credence in many of Weinstein's denials, it is not neces-

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sary to here solve the dispute in the testimony of the Salsmas as to whether Weinstein phoned them at all after the initial George Barnard contact. The contact and solicitation, purportedly on Weinstein's behalf, by Barnard, were clearly proven by the Salsmas, whom we believe. For reasons previously stated, we are convinced that Weinstein and George Barnard had a standing arrangement for Barnard to perform this very type of illegal activity.

THE STAGED ACCIDENTS OF OCTOBER 16, 1958 (COUNTS 14, 15 AND 16) (SCOTT - BARNARD - ROSE - McCOY - DUNHAM) AND SEPTEMBER 11, 1958 (COUNTS 17 AND 18) (BARNARD, DEEGAN (GALLIANO), SONNY DEEGAN, SAUNDERS, BOISJOLIE, HOWERTON)

MOTION TO AMEND COUNT 18 TO CHARGE WEINSTEIN WITH KNOWINGLY PERMITTING GALLIANO TO GIVE FALSE TESTIMONY ON A DEPOSITION

These charges are extremely serious. The count concerning the September 11, 1958, accident, resulted in a federal conviction, reversed on appeal for a new trial, followed by a voluntary, government dismissal.

Because of failure of proof, Weinstein is found not guilty of counts 14, 15 and 16.

It is observed in passing that George Barnard very successfully ran the cases of the occupants of the "target" car (Rose, McCoy and Dunham) to Weinstein, all of whom Weinstein represented, each of whom received the usual "loans" from Weinstein after being dutifully told by Barnard that Weinstein would lend them money. Weinstein came to the hospital, on a nurse's call suggested by McCoy, saw all of them, and agreed to represent them. Referring back to the Barnard "conspiracy—solicitation" Count 12, these events were too pat, and too much part of a proven pattern, to be accepted as other than additional circumstantial proof of Weinstein's guilt

in the solicitation of law business, even though not proven guilty of staging this accident or knowingly accepting claims arising from it as a staged accident.

The Committee finds that, except for Weinstein's alleged participation or knowledge, the accident of October 16, 1958, was clearly proven to be faked by the participants, George Barnard, McCoy, Rose, Scott and Dunham.

As to the accident of September 11, 1958, the Committee finds the accused not guilty of Count 17, in that the Bar failed to prove that he participated in the planning or execution of this prearranged collision.

That it was deliberately planned and executed by George Barnard and the active participants, Boisjolie, Saunders, Howerton, Sonny Deegan and Geraldine Galliano (then Mrs. Sonny Deegan), was very clearly proven. Most of the participants were either found guilty or pleaded guilty in the federal court proceedings.

Here, again, was the familiar pattern of the "victims," or "targets," the two Deegans and Saunders, being sent, by prearrangement, to Weinstein by George Barnard for the handling of their cases, and for "loans," which they promptly received.

COUNT 18

As to Count 18, the accused is found guilty, in that *after* accepting the cases of the so-called "victims," the Deegans and Saunders, and while pressing claims and actions on their behalf, he knew that the accident in which they were involved was faked and fraudulent. See Bar Brief pp. *85 to 100*, which, in the main, fairly summarizes the evidence pointing to guilt.

The evidence before this Committee as to Counts 17 and 18 was, if anything, more complete than that before the federal court jury which convicted Weinstein of complicity in the *planning* of the faked accident of September 11, 1958. That conviction was reversed and a new trial ordered on that count (Count VI in the federal

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indictment) only because of the rejection of certain evidence concerning the federal charges against and [sic] indictment of Sonny Deegan for alleged intimidation of a witness in the mail fraud trial, but there was no reversal because of failure of proof. To the contrary, the majority opinion (342 F. 2d 309, p. 320), as to the evidence against Weinstein on federal Count VI, stated:

> "In our opinion, the foregoing evidence would justify a jury in concluding, from the relationship between Weinstein and George Barnard and of Barnard to the accident, from the fact that Weinstein advanced moneys to persons who were no longer his clients, from the fact that some of Weinstein's advances were to persons who did not then have cases pending in his office, from what Weinstein did in relation to the Deegans and from what Barnard did, that Weinstein was in fact a party to the faking of the accidents to which count VI relates. The jury was not required to believe Weinstein's denials or to find that the manner in which Weinstein was advancing money to Barnard and to some of the others was similar to that referred to by the Portland attorneys who testified as to the custom of financing personal injury clients.
>
> "We think it no answer to say that Weinstein's reputation was apparently good, that he handled a large number of cases as to which no question has been raised, or that it is not conceivable that a man in his position and of his intelligence would risk so much for so little by trying to add to an already large income through participation in these fraudulent cases, which could not be expected to produce large returns. Many a man of fine reputation has descended to criminality. If Weinstein did the things that the Deegans say he did, then those who testified as to his reputation must have been, to say the least, incompletely informed about him. Many criminals are still honest in most of their transactions. And cupidity plays strange tricks upon probity, calcula-

tion and intelligence. All these matters are for the jury.

"We do not agree that the Deegan testimony should be excluded. Every exclusionary rule, while it may be a barrier to deception in one case, may be a barrier to truth in another. We are reluctant to create a new one. Competent counsel, with the full story of the government's treatment of the Deegans before the jury, may well be able to convince the jury that they should not be believed. This opportuity, we think is all that Weinstein is entitled to."

This is cited to demonstrate that this Committee regarded as a trier of fact, by jury standards at least, could reasonably conclude that guilt exists on substantially similar facts.

It must be remembered that this is not a criminal trial, in which guilt must be proven beyond a reasonable doubt. Rather, it is a special proceeding involving primarily the issue of the general character and fitness of an individual to continue in the practice of law, because of certain challenged activity. The rules of evidence are more liberal, both for and against the accused, and the triers of fact are here considering an entire course of conduct, not one isolated episode, in an effort to determine whether that individual is no longer qualified by his moral character for the privilege of a law practice, with its attendant public responsibilities.

The Committee has heard many of the witnesses called at the federal trial and has considered the testimony there given by those beyond the reach of subpoena at the Bar trial.

Mrs. Galliano (former wife of Sonny Deegan), directly implicated Weinstein in guilty knowledge of the existence of a faked accident. She was an impressive, straightforward witness with no motive to falsify and

no disclosed malice against Weinstein at the time of our hearing, and we accept her testimony as true.

We did not hear her ex-husband, Sonny Deegan (beyond reach of subpoena at the Bar trial) but have examined his federal court testimony. It, in general, supports the testimony of his then wife in proving Weinstein's guilty knowledge. We do not accept the theory that Deegan was pressured by the alleged intimidation of a federal indictment into giving false testimony against Weinstein.

The recanting by Deegan in his federal court new trial affidavit is not at all convincing. His testimony given at the new trial hearing substantially weakens it as a positive assertion of truth (see Bar Brief, p. 95).

Like Deegan, many of the witnesses who appeared before the Committee, such as George Barnard, Boisjolie, Lasiter, McCoy, Saunders and Traver, in many areas and instances, gave evidence at the Bar trial, different from what they had stated, or sworn to, in earlier statements on the same subject matter, and some stated that they lied in earlier inconsistent statements. It is difficult to reconcile all of these conflicts. However, as in many instances of immoral, illegal or criminal conduct, the witnesses other than the accused are of dubious and evasive character, because their own conduct is also involved.

It is both necessary and possible in such circumstances to arrive at proper conclusions as to the truth by weighing the character, actions and statements of the accused wrongdoer against the confusing statements of these outside witnesses. By so doing, a pattern of truth often emerges.

Here, we do not believe Weinstein's denials. His other acts for which we believe him guilty do not qualify him for ready belief. His evasiveness about his records, his loans, his dealings with persons such as George Barnard, Knippel and Travers, challenge his frankness.

His later dealings with George Barnard during and

after the Bar trial lead to the same conclusion. The latter, in and of themselves, consisting only of two meetings during the trial, *before* and *after* George Barnard's testimony was finally given, took place under odd circumstances, with no disclosed relationship to the trial. They tend to bely Weinstein's protestations of his extreme dislike for George Barnard, and the lack of any close relationship between them. The first meeting was at the Huffman Oldsmobile agency, before Barnard testified, lasted for almost an hour, with both men standing on a car lot, without any counsel present. If they were not on good terms, what were they talking about?

Again, after Barnard's testimony, and during the trial, they met, apparently by chance, in a bar, and engaged in purely social, non-trial related discussions. What were they talking about? If Barnard were threatening or making improper overtures, would Weinstein not have so testified? We think these meetings, particularly the first, were prearranged and that Weinstein has not fully disclosed what took place.

In evaluating, circumstantially, Weinstein's guilt or innocence on Count 18, and the veracity of his denials, certain other factors tip the scales against him. These include:

(a) His long acquaintance with, loans to, and acceptance of business sent to him by George Barnard. Barnard was the brain of this and other faked accidents in which Weinstein represented participants sent to him by George Barnard.

(b) There is evidence that Weinstein told McCoy and Rose to say they were referred by Keith Rose's brother, rather than by Barnard.

(c) Weinstein told George Barnard, Knippel and Lasiter to get out of town after the Bar and federal investigations started in 1960. See later discussion of cause of complaint 24.

(d) Lastly, Weinstein's conduct concerning the

Saunders power of attorney (Counts 19, 20 and 21) also indicates a guilty knowledge concerning this accident.

AMENDMENTS TO COUNT 18

The new material sought to be added to Count 18 by the Bar during trial consists of charges (1) that Weinstein knowingly permitted Geraldine Galliano, then Mrs. Sonny Deegan, to testify falsely in her deposition given September 15, 1959, in the civil case filed by Weinstein for her arising from the staged automobile collision of September 11, 1958, by swearing that she lost substantial time from work, when in fact she had not, and by further testifying that she had been sent to Dr. Wood for examination by a girl friend of hers, rather than by Weinstein; (2) that Weinstein told the Deegans to dispose of the automobile involved in the fake accident; and (3) that Weinstein told the Deegans to give a false impression of injuries to Dr. Wood. These acts were all proven at the Bar trial, and this evidence itself constitutes part of the proof of Weinstein's complicity in knowingly pursuing false claims arising from the accident. The amendments sought were proper, and well within the scope of the subject matter of the original charge of Count 18. Weinstein is found guilty of these collateral charges.

COUNTS 19, 20, 21

19—FALSE SIGNATURE ON SAUNDERS' RELEASE

20—FALSE SIGNATURE ON SAUNDERS' SETTLEMENT DRAFT

21—CAUSING BACKDATED POWER OF ATTORNEY TO BE SIGNED BY SAUNDERS AND USED AS FALSE EVIDENCE IN FEDERAL COURT TRIAL

Saunders was a claimant who went to Weinstein after the faked accident of September 11, 1958. The evidence shows he participated in faking the accident. He received substantial loans from Weinstein and on final settlement in 1961, after federal trial began, received a final payment of about $50.00 from Weinstein.

Weinstein negotiated settlement of the two Deegan an [sic] one Saunders claims with Perrin, an insurance adjuster, in early 1960, at a time when Saunders was out of the state and without Saunders' knowledge or direct approval. The figure arrived at was a gross, unallocated figure for all three claims. There is no evidence that Saunders was ever advised of the settlement until after the federal trial began in September, 1961, when he got from Weinstein about $50.00 during the federal trial.

Obviously, Weinstein made the division of the proceeds of the agreed upon aggregate settlement with Perrin himself, and without consulting Saunders, and kept the proceeds of the settlement, received in March, 1960, until he gave the part not consumed by his loans and fees to Saunders in about September, 1961.

The Saunders release and draft were admittedly signed by Weinstein, when received in March, 1960, by simulating Saunders' signatures on each document. The release is Count 19 and the draft, Count 20.

The power of attorney (Count 21) purports to have been signed by Saunders in November, 1958.

The Committee finds that it was actually signed by Saunders in or shortly after March, 1961, after Weinstein knew he was under suspicion, and indictment, for the purpose of manufacturing false evidence to be used in the federal trial, to justify his forged signatures of Saunders' name on the claim draft and release. True, the testimony leading to this conclusion comes from unsatisfactory sources — Saunders and George Barnard, each of whom, as to this episode, have given conflicting statements and testimony. However, we accept their evidence that Barnard did arrange a meeting downtown between Saunders and Weinstein in a car, in March, 1961, where a meeting was held, in which the projected signing of a power of attorney by Saunders was discussed and Saunders' statement that he did later go to Weinstein's office to sign a document, which we believe to be the power of attorney.

Irrespective of legality, it is not normal for a lawyer acting under a power to sign his principal's or client's name without disclosing the agency relationship. Honesty and fair dealing with the other party require a disclosure so that this person, such as Perrin, the adjuster, can satisfy himself as to the authority of the purported agent. Here, again, Weinstein's personal interest in the loans he made to clients, such as Saunders, who was then out of the state, to be repaid his loans, induced him to commit improper acts in signing the release and draft with his client's forged signatures. Obviously, he was not interested in anything else because he finally paid Saunders only $50.00, all that was left after payment of advances and fees, if any were charged.

When these acts came under scrutiny in the federal proceedings, the power of attorney was obtained and back-dated to justify them.

COUNT 24—ADVISING WITNESSES TO AVOID SUBPOENAS

This count accuses Weinstein of counselling George Barnard, Lasiter, Knippel and Boisjolie to absent themselves to avoid subpoenas and the giving of testimony, in the federal crminial case and, by amendment on trial, to avoid Bar subpoenas.

The complaint charges these acts were committed "prior to March 15, *1960*."

There was evidence from Knippel that, shortly before January, *1961*, Weinstein told Lasiter, George Barnard and Knippel that "things were getting pretty hot at the Bar Association," that there might be indictments, that the three of them "better leave town," and that Weinstein told them also to see Boisjolie and tell him, too, to leave town.

George Barnard also testified that Weinstein told him to get out of town because "things was hot."

There was also testimony that some of these persons did, for a time at least, leave the vicinity for spots where

they might not be found, such as the John Day River.

The charged timing of these episodes, if they occurred as testified, is not correct. The date before which they took place was obviously March, *1961*.

In any event, despite the error, we think Weinstein was not misled. As we recall, no objection was made that he was unfairly prevented from meeting the charge.

Despite Weinstein's denials, we accept the evidence of Knippel and George Barnard in this area as substantially true and hold that this count, with respect to acts by Weinstein directed against George Barnard, Lasiter and Knippel, was proven and that Weinstein is guilty of the charge as to them.

Concerning this count, it should be observed that the evidence as to Weinstein's urgings that George Barnard, Lasiter and Knippel leave town itself tends to prove his guilty knowledge of events in certain of the charges previously discussed.

COUNT 4—ALLEGED FALSE NOTARIAL AFFIDAVIT ON DORIS ROSSOS COMPLAINT

The accused is found not guilty of the charge. The evidence shows that he was retained by Doris Rossos in May, 1959, to handle a claim and file an action against one, Hensley, for injuries arising from an automobile collision. While Mrs. Rossos claims the action was filed without her authority, we think the evidence as to her original authorization to Weinstein and dealings with him warrants the conclusion that the accused did not exceed his authority when he later filed an action on her behalf.

The only issue is whether the notarial certificate of the accused that Mrs. Rossos subscribed and swore to the complaint before him as a notary on May 5, 1960, was true or false. Mrs. Rossos denies being in Weinstein's office at any time after the Fall of 1959, whereas Weinstein denies any memory of the circumstances under which the complaint was signed. The only handwriting

expert called, Sergeant Alderson, of the State Police, testified that Mrs. Rossos purported signature was a forgery.

Mrs. Rossos was obviously angry with Weinstein for alleged delay in settling her claim, finally dismissed Weinstein, and settled direct with Hensley's liability insurance carrier.

This is an instance in which the passage of time and the practice of lawyers and notaries to fail to keep records of their notarial acts could easily work unfairly against the accused in attempting to reconstruct what occurred.

Because of the obvious prejudice of the complainant, Mrs. Rossos, the general unreliability of expert handwriting opinions, the lack of any real motive for the accused to falsify the notarial certificate, and the lapse of time, we think a finding of not guilty on this charge is justified.

COUNT 22—ATTEMPT TO PROCURE FALSE TESIMONY FOR USE IN DEPOSITION IN McARTHUR V. BAKKIN

This charge was dropped on trial and no evidence concerning is was presented by either side.

This count of the Sixth Amendede [sic] Complaint is therefore dismissed.

COUNT 25—COURSE OF CONDUCT

This is the so-called "catchall" charge, based on ORS 9.480, which alleges that the acts and conduct previously and more specifically set forth in the State Bar complaint are such that, if the accused "were applying for admission to the Bar, his application should be denied."

In a sense, this is the most serious of all of the charges. In any event, it is most descriptive of the conduct now under scrutiny by the Bar. As to some of the charges for which we have found guilt, the degree of guilt, considering each isolated charge alone, may not

appear to be great. As to some others where guilt is found, the evidence may appear at first blush to be highly conflicting or circumstantial, involving the hard choice of deciding the credibility of witnesses, and isolating the thread of truth and plausibility running through the mass of conflicting evidence. However, the task is made easier and the truth more apparent if the evidence concerning all of the specific acts or episodes for which guilt appears is measured and viewed as a whole. From the evidence as to them, and indulging the liberal rules of admissibility which we deem to be proper, a picture of a course of conduct quickly emerges which leaves little doubt as to a correct solution. This is a picture of calculated and reckless disregard of the ethics of the profession, for a period of over three years.

In our opinion, the accused is guilty of this count, and he should not be admitted to the Bar if he were now applying.

PUNISHMENT

The Committee recommends permanent disbarment.

Suggestion is made by the defense that, if guilt should be found, the accused has already been adequately punished because he has been out of practice for all practical purposes since he was indicted in federal court in January, 1961, with the federal charge against him not disposed of until shortly before his reinstatement by the Oregon Supreme Court June 3, 1965. He claims that his practice has been "completely destroyed" and that he has spent "approximately $70,000.00 in defending himself."

In our judgment, the offenses, considered as a whole, show that the accused was not and is not fitted by character to practice law. If we are right, and he is guilty, then both the charges against him and his vigorous defense and denials show no hope of reformation and he should not be permitted to practice. On the other hand, if we are wrong in our findings of guilt, he should be publicly found to be innocent and fully reinstated.

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Any middle ground, of a half-hearted finding of limited guilt, with limited punishment, is not warranted by the record before us.

DELAY

Before the start of the taking of evidence in this proceeding on October 17, 1967, the accused obtained a Multnomah County Circuit Court restraining order, without notice, against further prosecution of the charges herein because of alleged unreasonable delay by the Bar in these proceedings. On motion of the Bar, and by order and judgment of Judge Sulmonetti October 13, 1967, the restraining order was dissolved, a demurrer sustained, and the suit dismissed.

The trial herein then proceeded on October 16, 1967, and evidence in it was concluded November 13, 1967. During the trial, an adjournment for a few days only, for the convenience of counsel and the Trial Committee, was taken.

The record of 2731 pages, in 14 volumes, and numerour exhibits, was completed and delivered to the Trial Committee December 11, 1967. Detailed written briefs prepared by both sides after extensions granted by the Committee, with the consent of both sides, were finally served and filed and the cause submitted for final decision by the Committee June 4, 1968.

Immediately before the Committee trial started, the accused filed a demand for dismissal served October 16, 1967, supported by his affidavit dated October 14, 1967, together with a memorandum of authorities. This demand was based, again, on alleged delay in the State Bar prosecution resulting in alleged infringement of the accused's constitutional rights. Arguments were heard by the Committee and the demand denied by the Committee before trial commenced.

A large part of the delay cannot be attributed to the Bar. The original disbarment complaint was served in November, 1960. The Federal Court indictment followed

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in January, 1961. In February, 1965, after Weinstein's conviction in the trial court, the Ninth Circuit reversed the conviction and sent the case back for new trial on the count involving the faked accident of September 11, 1958. (342 F. 2d 309). Shortly after, this charge was dismissed on motion by the United States Attorney.

Weinstein was suspended by the Oregon Supreme Court, because of his conviction, from February, 1962, until he was reinstated by order of court in June, 1965. He obtained a federal court injunction against further proceedings by the bar, during the pendency of the Federal proceeding. This injunction was not lifted until April, 1962, after he was sentenced by the federal trial judge.

During the Federal appeal, the Bar proceeding was held in abeyance, with Weinstein's full approval, for reasons best known to the prosecution and Board of Governors, but without formal action by the Trial Committee. We conjecture that it was because of a desire to avoid a double trial of some of the issues involved in the Federal proceeding, in the event Weinstein's conviction should be sustained.

In any event, the only delay not caused by or approved by Weinstein was between the late Spring of 1965 and early September, 1967, when this cause was first set for trial on the Sixth (and final) Amended Complaint. All delays after that were sought by, caused by, or approved by Weinstein.

Hence, the only period of possible criticism is slightly over two years, at least part of which was necessarily consumed by proper efforts of the Bar to reprepare its case after the Federal trial and part of which was consumed by mainly unjustified motions or demands for particulars or suppression of evidence filed by the accused. These dilatory motions and applications all required time to bet set, argued and disposed of before the Trial Committee, one of whose three members lives and practices at John Day, at a long distance from the trial venue in Portland.

Moreover, it must be remembered that the burden of prosecution for the Bar was carried by a panel of non-paid, busy, practicing lawyers, and that the members of the Trial Committee are themselves in active practice with business and court schedules to meet. The setting of dates to handle hearings on the preliminary motions filed by the accused meeting the schedules of the five or six attorneys acting for both sides, and of the three lawyer members of the Committee itself, involved necessary loss of time.

It may be of passing interest only to note that in the earlier stages of this proceeding, the personnel of the Trial Committee was changed by the appointment of a substitute chairman, after the accused had voiced objection to the original chairman.

In any event, the Committee has listened attentively to the numerous witnesses called by the Bar and the accused, as well as the accused himself, and has carefully examined the numerous exhibits and excerpts of the Federal criminal trial transcript and has concluded that the delay has not materially harmed the accused in his defense, but probably did, in fact, result in weakening or loss of evidence which would have been available to the prosecution at an earlier trial.

The testimony of various witnesses, such as George Barnard, was far less favorable to the Bar than earlier statements obtained from them during the first stages of the Bar and Federal proceeding. Many Bar witnesses professed a great loss of memory, haziness and unwillingness to be involved. Since the case was tried much like a criminal case, with the Bar attempting to prove its charges by outside witnesses, rather than by initially calling the accused (as is often done), the many memory failures and changes in testimony by various Bar witnesses did not harm Weinstein, but served to water down the strength of the evidence against him.

We have previously commented on the failure of the accused as a part of his own case to come forward with

adequate records to document or explain some of his challenged dealings. We do not recall any assertion by him that important records, in specific areas, have become lost, misplaced or destroyed due to the lapse of time. He has known that he has been under suspicion or accusation since 1960, and it is unlikely, therefore, that he would have permitted specific records, favorable to his defense, to be destroyed or mislaid, without making some very pointed and detailed explanation to the Committee as to the nature of the lost records.

Moreover, an examination of his testimony at the Bar trial, except in a very few instances, reveals an ability to recall, with rather remarkable precision, events and details of his practice and dealings with clients. On the surface, his asserted memory of events was much better than that of many of the witnesses called against him.

Laches, as such, are not a defense in a disbarment proceeding. *In re J. Kelly Farris*, 229 Or 209.

We therefore find that there has been no unreasonable delay and that the accused has not been substantially harmed by the delay which did occur.

DATED July 11, 1968.

Respectfully submitted by the Trial Committee, composed as follows:

ORVAL D. YOKOM

Orval D. Yokom

HARVEY S. BENSON

Harvey S. Benson

R. R. BULLIVANT

R. R. Bullivant,
Chairman

APPENDIX F

(Excerpts From Rules of Procedure)

Adopted by the Board of Governors, February 4, 1966.
Approved by the Supreme Court, March 29, 1966.
Effective March 29, 1966.

Section 12. Notice and Service. A copy of the complaint, accompanied by a notice to answer it within a designated time, shall be served upon the accused. Such service shall be made by the Secretary, by a member of the state bar designated by the President or in the manner provided by law for the service of summons within the State of Oregon in a case pending in a circuit court of the State of Oregon. The accused shall appear and answer the complaint within 10 days from the date of the service of such notice upon him, if served within any county of the state, and, if served outside the State of Oregon, within 30 days from the date of the service of such notice. * * *

Section 19. Default. If the accused shall fail to answer the complaint within the time allowed by these rules of procedure, the trial committee may proceed to a determination of the charge; and the accused shall not be entitled to further notice, except the notice of recommendation required by ORS 9.540.

Section 20. Pleadings. The pleadings permissible in proceedings before the trial committee are the complaint and amended complaint (if any), and the answer and amended answer (if any) to the complaint. Demurrers and motions shall not be allowed.

Section 21. Amendments. A complaint may be amended at any time to set forth additional facts, whether occuring before or after commencement of the hearing, investigation or trial, either in amplification of the original charge or to add new charges. In case of such amendment, the accused shall be given reasonable time, to be fixed by the Board or trial com-

mittee, to answer the amended complaint, to procure evidence and to defend against the misconduct charged. The Board or the trial committee may, at any time, allow or require other amendments to the complaint or to the answer.

Section 22. Informalities. Informalities in a complaint, notice to answer, answer or in procedure shall be disregarded. No finding, recommendation, order, decision or determination made in a disciplinary proceeding shall be invalidated on the ground of error in the admission or rejection of evidence, or in pleading, or in procedure, or upon any other ground, unless, upon the whole record, including the evidence, the Board shall be of the opinion that error which resulted, or would result, in the miscarriage of justice has occurred.

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Supreme Court, U.S.
FILED
APR 29 1970
JOHN F. DAVIS, CLERK

No. 1299

In the Supreme Court of the United States

OCTOBER TERM, 1969

In re Complaint as to the Conduct

of

PHILIP WEINSTEIN, Accused,

Petitioner.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT OREGON STATE BAR

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The Oregon State Bar brief charges that Weinstein did not request a speedy trial. Thus, he cannot complain about the delay, citing various non-Oregon criminal cases (Bar Br. pp. 2, 11, 13).—The Bar did *not* inform this Court that in Oregon it is the sole duty of the prosecution to set a case for trial promptly. The accused in Oregon has no duty to act in order to get a case set.

The Bar recognized and acknowledged this fact and rule in its brief herein before the Oregon Supreme Court. There the Bar stated:

> "We also note that the decisions of this court [Oregon Supreme Court] thus far appear to have rejected the federal and majority state rule above cited in that they have refused to find waiver of the right to speedy trial in the mere fact that the Accused has failed to call his case for trial or to insist that it be set for any particular time. . . . *State* v. *D'Autremont*, 212 Or. 344, 350, 317 P.2d 932 (1958)." (Bar Br. Ore. Sup. Ct. pp. 27-28).

The Bar partially excuses its delay. From October, 1964 (the date of the Circuit Court of Appeals' first opinion—Ex. 147), to April, 1965 (date of dismissal of indictment against Weinstein by federal court), the Bar says it would have been "inappropriate" to act. To do so would have violated the "spirit of the injunction"—"it would have been contrary to the principles established in the 1961 injunction proceedings" (Bar. Br. pp. 4, 6, 18).—The foregoing is fallacious and misleading. In granting that injunction against the Bar in December, 1961, the three-judge federal district court specifically stated that the Bar *could at any time* thereafter prosecute all charges based on acts alleged in that indictment. This had to be obvious since at the time of the three-judge decision Weinstein had already been tried on that particular federal court indictment and had testified at the trial (see injunction opinion, Pet. Op. Br., App. D. 22, 28).

When the Bar first set the case for trial in September, 1967, Weinstein asked a postponement be-

cause his attorney had many cases previously set for trial (see motion and affidavit of counsel, Bar Br. pp. 37, 38). The Bar quotes Weinstein's counsel as saying—with emphasis added:

> " 'for it to be set over another month or so would not cause meaningful additional hardship or difficulty.' " (Bar. Br. p. 11)

This selected quote was preceded with:

> "To require that the disbarment case go to trial on September 6, 1967, would work a hardship on a number of my clients and a large number of other lawyers and clients. The Weinstein matter has been delayed for years." (Bar Br. App. D. 40)

The Bar significantly expresses "serious concern" about "some of the language" of *Spevack* v. *Klein*, 385 U.S. 511 (1967) and *In re Ruffalo*, 390 U.S. 544 (1968). However, the Bar is relieved that "the basic character" of disbarment proceedings remains "civil"—not "criminal" (Bar Br. p. 24).

Obviously, the Oregon State Bar and the Oregon Supreme Court will continue to deny lawyers their rights under the Fourteenth Amendment. They intend to continue to ignore the plain implications and language of *Spevack* and *Ruffalo*. The decision of the Oregon Supreme Court herein intentionally circumvented and ignored *Spevack* and *Ruffalo*.

If the Bar is allowed to deny Weinstein his rights under the Fourteenth Amendment as the Oregon Supreme Court says it can, this victory will not go un-

noticed by Bars in many of the other states. Bar associations do not like *Spevack* and *Ruffalo* (Bar. Br. p. 24). The decision in this case will be used as an excuse all over the country to further erode the principles therein established by this Court.

Disbarment proceedings are far from being "civil and protective," as the Bar asserts (Bar. Br. p. 24). The result is bound to be "criminal and punitive" (Bar Br. p. 24) if the Bar prevails. There is nothing very "civil" or "protective" when a man loses his only real means of livelihood for life. He has received a "sentence" that can be the equivalent of a $500,000 fine, forfeiture of his property, and public disgrace for himself and his family.

The Bar states that "this is . . . *a question of great importance.*" (Emphasis added. Bar. Br. p. 24). It is indeed!

It is particularly important to all persons who in their hour of peril need a fearless, fighting lawyer, however unpopular the cause may be; lawyers who know they cannot later be scuttled in some "*civil* and *protective*" proceeding, deprived of the usual Constitutional guarantees.

CONCLUSION

For the foregoing reasons, and for those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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